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## SEX-BIAS TOPICS IN THE CRIMINAL LAW COURSE: A SURVEY OF CRIMINAL LAW PROFESSORS†

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Nancy S. Erickson\*

Mary Ann Lamanna\*\*

Incorporating new developments in law into the legal curriculum is a constant challenge. In recent years, changes in legal theory and practice have often had gender as a focus.

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† This Article reports on some of the findings of a project entitled "Sex Bias in the Criminal Law Course: Bringing the Law School Curriculum into the 1980's," funded primarily by an Ohio State University Affirmative Action Grant and other funds from the University and from the Ohio State University College of Law.

The project proceeded in three concurrent steps: a review of seven widely used criminal law casebooks; a questionnaire survey of all law professors currently teaching criminal law; and a bibliography that may assist criminal law casebook authors when they write new editions and to professors of criminal law who wish to compensate for inadequacies in traditional teaching materials. The Rutgers Law Review recently published the Final Report of the Project, which contained the results of the casebook reviews, an overview of the questionnaire findings, and the bibliography. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309 (1990) [hereinafter Erickson, *Final Report*].

Nancy S. Erickson is the Project Director. Professor Nadine Taub (Rutgers-Newark) is the Primary Consultant. Two groups of experts lent their assistance. The Panel consisted of Professors Marina Angel (Temple), Maria Marcus (Fordham), Vanessa Merton (Pace Law School), Elizabeth Schneider (Brooklyn), Barbara Underwood (N.Y.U.), and Lauren Shapiro, N.Y.U. Law School class of 1986. The Task Force consisted of Professors Barbara Babcock (Stanford), David Chambers (Michigan), Victor Streib (Cleveland State), Harry Subin (N.Y.U.), and Charles Jones (Rutgers-Newark). Professor Mary Ann Lamanna (Nebraska at Omaha) joined the project in 1986 to further the analysis of the data and to participate in writing the results of the survey.

The authors also wish to thank the following for their helpful comments on an original draft of the article: Marina Angel, Maria Marcus, Martha J. Smith, and Nadine Taub.

For a preliminary report on the Project, see Erickson, *Legal Education: The Last Academic Bastion of Sex Bias?*, 10 NOVA L.J. 457 (1986) [hereinafter Erickson, *Legal Education*]. For a summary of some of the study's findings and a discussion of how to apply the methodology used in this study to other law courses, see Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988) [hereinafter Erickson, *Sex Bias*].

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As a "central cultural and social institution" that is "fused with and thus inseparable from all the activities of living and knowing,"<sup>1</sup> it is not surprising to find law affected by the feminist movement and other social and economic forces that have altered gender roles. In turn, law has been seen as a powerful means of effecting social change and seeking justice and equity for women and other disadvantaged groups.<sup>2</sup>

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1. Silbey & Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 171, 173 (1987); see generally F. MOORE, LAW AS PROCESS (1978).

2. Some legal and public policy scholars would qualify the claim that law is an effective tool for social reform and the attainment of justice. They argue that legal reforms have a substantive impact only in limited situations and that "their primary value rests in providing legitimacy and visibility to certain attitudes and values. These symbolic gains may be enough to satisfy some groups or may create the momentum required to achieve instrumental goals later." J. MARSH, A. GEIST, & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM 5 (1982), *commenting on* J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978).

A number of feminist legal scholars have noted that law may be an especially limited tool for social change where it concerns gender disadvantage. For a perspective that acknowledges "that law is embedded in our culture" but that concludes that precisely for that reason legal reform cannot achieve social change "too far afield of . . . societal norms," see Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781, 781. Professor Fineman argues that "even the most creative tinkering will ultimately lead nowhere," and therefore "[t]he solutions to women's inequality will not be found in the legal rules but in the cultural and social climate in which legal rules are developed and used." *Id.* at 782, 785.

Others have argued that a legal ideology of equality has not managed to overcome women's subordination because the assumption persists that legal distinctions are based on real differences between men and women and because the courts have hesitated to interfere with the "right" of a man to rule his household. See Taub & Schneider, *Perspectives On Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 117, 124-35 (D. Kairys ed. 1982); Estrich & Kerr, *Sexual Justice*, in OUR ENDANGERED RIGHTS 98, 102-20 (N. Dorsen ed. 1984); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983). The idea of distinct private (family) and public spheres has emerged in modern society. See P. BERGER, B. BERGER & H. KELLNER, THE HOMELESS MIND—MODERNIZATION AND CONSCIOUSNESS (1973). Some scholars posit that this idea has rendered socially invisible much discrimination and victimization of women, placing it beyond legal scrutiny. On the other hand, the "right of privacy," enunciated by the Supreme Court from *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) onward, has protected women from state intrusion into reproductive decision making.

Finally, Wendy Williams asserts that "women's equality as delivered by the courts can only be an integration into a pre-existing, predominately male world." Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175 (1982).

Nevertheless, this study of the teaching of gender-related topics in criminal law presumes that changes in law, legal education, and legal practice do have a significant impact on the status of women in society. Many of the authors cited above

How have these legal and social developments affected legal education? The most visible change is that women now comprise approximately forty-two percent of full-time law students.<sup>3</sup> We know far less, however, about curricular change: Does law as it is taught take into account the interests and experiences of women as well as men? Does it address issues of sex bias in the law?

This research asks and partially answers these questions with regard to the teaching of criminal law. Data from a survey of 238 criminal law professors provide information about the inclusion of gender-related topics in the basic criminal law class. Gender-related topics are defined as: (1) topics of particular concern to one sex (such as self-defense by battered women); (2) topics that raise or have the potential for raising sex-discrimination<sup>4</sup> issues (such as the prosecution of prostitutes but not their customers); or (3) topics where the legal doctrine may reflect male experience and values (such as the "reasonable man" construct). These issues may be treated in one of three ways in law courses: (1) they may be ignored; (2) they may be presented in special courses on sex-based discrimination; or (3) they may be incorporated into core courses.

Traditional legal education largely has accepted cultural assumptions about gender differences. Sex bias goes unrecognized when law is treated as an objective, neutral enterprise having little to do with ascribed characteristics such as gender. Thorough criticism of this approach may be found elsewhere, and it need not be repeated.<sup>5</sup> Suffice it to say that a society committed to equality in law should respect the interests of women as well as men. Moreover, as these critiques have made clear, inclusion of gender-related topics commonly enhances understanding of a legal theory, as assumptions and complexities can be more fully explored.<sup>6</sup>

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themselves are involved deeply in social change through legal reform and the formation of public policy.

3. See ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE U.S., FALL, 1989, at 65 (1990).

4. We use the term "sex discrimination" to refer to laws that are sex based on their face, laws that have the effect of discriminating on the basis of sex, or laws that afford wide opportunity for discriminatory enforcement.

5. See, e.g., S. ESTRICH, REAL RAPE 27-79 (1987); Taub & Schneider, *supra* note 2.

6. For a bibliography of sources on gender-related topics in criminal law, see Erickson, *Final Report*, *supra* note †, app. C.

This bibliography of books, law review articles, and other materials was

Finally, as a matter of pedagogy, a curriculum that is sensitive to the interests, concerns, and dignity of women will provide a sounder educational environment for all students.

Many law schools have responded to these concerns by developing separate courses to treat women's and minority issues.<sup>7</sup> For example, a number of law schools now offer a course in sex-based discrimination and the law, for which excellent casebooks exist.<sup>8</sup>

These classes ensure some coverage of gender-related topics, provide a forum for feminist law students and faculty, and are important as settings facilitating mutual support among women law students.<sup>9</sup> This solution, however, is less satisfying than it may at first seem, for it leaves the body of law and the core teaching of law unchanged. If gender-related topics are treated separately and discretely, the possibility of illuminating traditional topics by including the perspective provided by women's experience remains unrealized. Moreover, courses in sex discrimination are elective, and the majority of students do not take them. Consequently, students may have little exposure to gender-related topics and sex-bias issues.<sup>10</sup>

This Article addresses the empirical question of whether law school curricula have advanced to the stage of integrating materials on gender-related topics into core courses, thus exposing students to gender-related topics in the law and

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compiled and edited by Catherine Heid, Julia Davis, Diane Porter, and Nan Still, who were at that time graduates of or students at the Ohio State University (OSU) College of Law, under the supervision of Nancy S. Erickson and Joan M. Black, research associate. Diane Porter also provided invaluable editorial and other assistance.

7. See THEORIES OF WOMEN'S STUDIES (G. Bowles & R. Klein eds. 1983); Wallach, *A View from the Law School*, in WOMEN AND THE POWER TO CHANGE, 81, 107-11 (F. Howe ed. 1975).

8. Separate courses on sex-based discrimination (or women and the law) began to be offered in the early 1970s, before casebooks on the subject were even published. The first casebook was L. KANOWITZ, *SEX ROLES IN LAW AND SOCIETY—CASES AND MATERIALS* (1973), followed soon after by B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW—CAUSES AND REMEDIES* (1975); K. DAVIDSON, R. GINSBURG & H. KAY, *SEX-BASED DISCRIMINATION—TEXT, CASES AND MATERIALS* (1974). Current casebooks include H. KAY, *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* (3d ed. 1988) and J. LINDGREN & N. TAUB, *THE LAW OF SEX DISCRIMINATION* (1988).

9. See G. BOWLES & R. KLEIN, *supra* note 7; C. EPSTEIN, *WOMEN IN LAW* 234 (1983); Wallach, *supra* note 7, at 110-11.

10. G. BOWLES & R. KLEIN, *supra* note 7; V. SAPIRO, *WOMEN IN AMERICAN SOCIETY* 1-12 (1986).

presenting a perspective shaped by women's as well as men's experiences. We examine one of the central courses of the law school curriculum: criminal law. Although some of the attention directed to sex discrimination in law has focused on specific areas of criminal law such as rape and spouse abuse,<sup>11</sup> a more systematic scrutiny of the substantive rules of criminal law and the ways in which they are applied is needed. Does the criminal law ensure the just treatment of women as defendants, victims, and witnesses? Is sex bias in the law exposed and dealt with in law schools, courts, and legislatures? Are changes in the social roles of women and men reflected in the assumptions of the legal system? We examined these questions in the context of the criminal law course as the first step in a more comprehensive study involving the whole law school curriculum.<sup>12</sup>

## I. METHODOLOGY

Nancy Erickson surveyed law school professors who regularly teach criminal law. The survey asked criminal law professors about their coverage of gender-related topics, their experience in teaching and practicing law, and certain aspects

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11. See, e.g., S. ESTRICH, *supra* note 5, at 80-91; Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986).

12. While the study on sex bias in the teaching of criminal law was in process, Nancy Erickson worked with the Section on Women in Legal Education of the Association of American Law Schools (AALS) to plan a series of programs at the AALS annual meetings on sex bias in the teaching of law school courses. The first program, on criminal law, was held in January 1985, in Washington, D.C.; the second, on torts, in January 1987, in Los Angeles; the third, on contracts, in January 1989, in New Orleans; and the fourth, on property, in January 1990, in San Francisco.

Legal literature on sex bias in law teaching has been burgeoning. A partial listing, by topics, follows. Criminal Law: Erickson, *Legal Education*, *supra* note †; Erickson, *Sex Bias*, *supra* note †; Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988). Tort Law: Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U.L. REV. 495 (1988). Contracts: Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985). Constitutional Law: Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989).

of the teaching situation. The survey's primary objective was to determine whether the typical first-year law school criminal law course included certain gender-related topics. Its secondary objective was to encourage criminal law teachers to address sex-bias issues by calling attention to many of these issues in criminal law. Because of a lack of non-sex-biased material in current casebooks, an instructor's ability to cover gender-related topics in a broad and nonsexist way may be limited. The survey was complemented by a review, also directed by Nancy Erickson, of seven widely used criminal law casebooks. The casebook reviews are treated in another article.<sup>13</sup>

### A. Research Design

A Panel of lawyers with expertise in criminal law and sex discrimination formulated a list of gender-related criminal law topics to be used for both the survey and the casebook review.<sup>14</sup> The Panel met four times in 1984 and 1985 and consulted with other criminal law professors.<sup>15</sup> As a result of these deliberations, the Panel produced the following list of twenty-nine gender-related topics and subtopics including a global question about correcting sex discrimination:<sup>16</sup>

1. Killing of fetus as homicide.
2. Abortion.
3. Conspiracy between spouses.
4. Battering by spouses.
5. Self-defense by battered women.
6. Relationship between reasonableness and gender.
7. Wife's misconduct as provocation.
8. Rape:
  - a. Elements of the crime.

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13. The casebook reviews and a comparison of the casebook reviews to questionnaire reports of topical coverage appear in Erickson, *Final Report*, *supra* note †.

14. *See supra* note †.

15. *See supra* note †.

16. These topics are also listed in Table 2, *infra* p. 201. The global question on correcting sex discrimination, not being a substantive criminal law topic, is treated outside the numbering system in some tables. The original list also contained Marital Rape as a subtopic under Rape. This subtopic, however, was omitted inadvertently from the questionnaire, so we will not discuss it in this Article.

- b. Mistake-of-fact defense.
  - c. Diminished-capacity defense.
  - d. Death penalty for rape.
  - e. Who can be a victim.
- 9. Statutory rape:
  - a. Elements of the crime.
  - b. Mistake-of-fact defense.
- 10. Sexual harassment.
- 11. Criminalization of failure to act, e.g., child neglect.
- 12. Gender differentials:
  - a. In sentencing standards.
  - b. In capital punishment.
  - c. In treatment of victims and witnesses in the criminal justice system:
  - d. In degrees of culpability of accomplices.
- 13. Prosecutorial discretion regarding who to turn against whom.
- 14. Doctrine of marital duress.
- 15. Prostitution:
  - a. Elements of the crime.
  - b. Criminalization.
  - c. Vagueness.
  - d. Criminal sanctions on "johns".
- 16. Pornography.
- 17. Premenstrual syndrome defense.
- 18. "Ways that sex discrimination in laws can be corrected."

The topics fell mainly into four categories: (1) topics, such as abortion, concerning women's reproductive functions; (2) topics, such as rape and spousal battering, having to do with women as victims of male violence; (3) topics, such as the parental duty of care, connected with women's socially assigned roles as homemakers and caretakers of children; and (4) topics, such as spousal conspiracy and marital duress, representing vestiges of the common-law concept of coverture. These four categories might be helpful starting points for teachers investigating sex bias in other subject areas.

For each topic, the survey asked professors to indicate (1) whether they included the topic in their criminal law course; (2) how much time they allocated to the topic; and (3) their reasons for *not* covering the topic.<sup>17</sup> The survey asked profes-

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17. Nancy S. Erickson and the Panel designed the questionnaire, reprinted in



sors to select reasons for not covering a topic from the following list:

1. Not covered in the book  
(would cover it if it were in the book).
2. Covered too poorly in the book.
3. Professor feels uncomfortable with the topic.
4. Adverse student reaction to the topic.
5. Not as important as other topics.
6. Belongs in another course (specify).
7. Other.

The survey also asked professors whether the topic tended to polarize male and female students. In addition, the survey asked professors to describe casebooks and other materials used in the course.

The survey asked professors for the following background information: their sex, their experience in teaching and law practice, and their objectives in teaching criminal law (including whether they presented a connection between criminal law and social and political issues). The survey also asked professors whether their schools required a criminal law course. Finally, the survey asked professors about the perceived percentage of women students attending their schools and whether their schools offered any separate sex discrimination courses. The survey did not include questions on classroom climate because these are more appropriately addressed to students.<sup>18</sup>

To ensure confidentiality, respondents were asked to return their questionnaires to the Polimetrics Laboratory of Ohio State University, which coded the data and carried out the computer-based statistical analysis.<sup>19</sup>

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Appendix B, with the assistance of Valerie Martinez and Nora Groves, under the supervision of Aage Clausen of the Polimetrics Laboratory at Ohio State University.

18. See, e.g., R. HALL, *THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN* (1982) (available through the Project on the Status of Education of Women, Association of American Colleges). This report addresses the issue of classroom atmosphere. The report finds that women's education often is hampered by inattention or even hostility from male professors and students. We did ask the law faculty we surveyed about perceived classroom polarization regarding the teaching of gender-related topics, but a survey of women law students would be a better vehicle for investigating whether the law school classroom environment is generally a comfortable and supportive one for those students.

19. This work was carried out by research assistants under the supervision of Research Associate Joan Black; the Project Director then reviewed it.

### B. Sample

A questionnaire and cover letter were sent in the spring of 1985 to the 815 criminal law professors on the mailing list of the Association of American Law Schools.<sup>20</sup> Fifty-two indicated that they do not teach a basic criminal law course, but were included on the AALS list because they teach criminal procedure, criminology, corrections, or some related subject. Of the remaining 763 professors, 238 (31%) completed and returned the questionnaire.<sup>21</sup> Because length of service, coverage of topics, and orientation to the political and social context of criminal law varied considerably within the sample, we can conclude that responses were not confined to younger, more "liberal" professors. However, we have no way of determining how well those who responded represent all criminal law professors.

Table 1 presents characteristics of the total sample and of male and female professors separately. The criminal law professors who responded are overwhelmingly male; the thirty-six female professors compose only 15% of the sample.<sup>22</sup>

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20. The Association of American Law Schools (AALS) sections on Criminal Justice and Women in Legal Education endorsed the project. It was publicized at a variety of law conferences: the AALS Workshop on Professional Development for Women in Law Teaching, New Orleans, October, 1984; the Society of American Law Teachers, New York, December, 1984; the Conference on Reforming the Sex Bias in the Law School Curriculum, Washington College of Law, American University, Washington, D.C., January, 1985; the AALS annual meeting, Washington, D.C., January, 1985; and the Women and the Law Conference, March, 1985.

21. Some of the nonrespondents may also be individuals who do not teach criminal law, in which case the actual response rate would be higher.

22. This percentage is less than the national figure (1985) of 19.1 % of full-time law faculty who are women, but more than the 11.5 % women (1986) reported to be teaching criminal law. The statistic on proportion of women law faculty excludes deans and law librarians as well as part-time faculty. If those groups are included, 24% of law faculty are women. ABA SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE U.S., FALL, 1985, at 66 (1986) (hereinafter 1985 REVIEW OF LEGAL EDUCATION).

To determine the proportion of women teaching criminal law, those faculty listed by the AALS as teaching criminal justice and whose gender was identifiable from first name were counted. AMERICAN ASSOCIATION OF LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1986-87, at 905-11 (1986). Donna Fossum found in her 1975-76 study that women were not very different from men in their choice of criminal law as a specialty compared to more striking differences in choice of business-related specialties. See Fossum, *Women Law Professors*, 4 AM. B. FOUND. RES. J. 903, 912-13 (1980).

TABLE 1  
CHARACTERISTICS OF THE SAMPLE BY SEX (N=238)<sup>a</sup>

Characteristic	Total		Men		Women	
	% <sup>b</sup>	N	% <sup>b</sup>	N	% <sup>b</sup>	N
<u>Sex</u>			84.8	(201)	15.2	(36)
<u>Year of law school graduation</u>						
1910-37	1.8	(4)	2.1	(4)	0.0	(0)
1938-44	0.0	(0)	0.0	(0)	0.0	(0)
1945-59	15.2	(34)	17.5	(33)	2.9	(1)
1960-69	29.6	(66)	33.3	(63)	8.8	(3)
1970-74	25.6	(57)	25.4	(48)	26.5	(9)
1975-79	25.1	(56)	19.0	(36)	58.8	(20)
1980-	2.7	(6)	2.6	(5)	2.9	(1)
<u>Years taught law school</u>						
1-2	8.8	(21)	6.0	(12)	25.0	(9)
3-5	15.5	(37)	12.9	(26)	30.6	(11)
6-10	27.3	(65)	24.9	(50)	41.7	(15)
11-15	26.5	(63)	30.3	(61)	2.8	(1)
Over 15	21.8	(52)	25.9	(52)	0.0	(0)
<u>Years taught criminal law</u>						
1-2	19.0	(45)	16.0	(32)	36.1	(13)
3-5	24.5	(58)	22.0	(44)	38.9	(14)
6-10	23.2	(55)	23.5	(47)	22.2	(8)
11-15	20.7	(49)	23.5	(47)	2.8	(1)
Over 15	12.7	(30)	15.0	(30)	0.0	(0)
<u>Years practiced criminal law</u>						
0	32.4	(77)	29.5	(59)	44.4	(16)
1-2	17.2	(41)	16.5	(33)	22.2	(8)
3-5	24.8	(59)	25.0	(30)	25.0	(9)
6-10	13.9	(33)	15.5	(31)	5.6	(2)
11-15	7.6	(18)	8.5	(17)	2.8	(1)
Over 15	4.2	(10)	5.0	(10)	0.0	(0)
<u>Importance of social and political concerns in teaching criminal law</u>						
Rated on a scale of 1 to 7; 1 = Not Important; 7 = Important						
1-3	7.0	(16)	7.7	(15)	2.9	(1)
4-5	20.4	(47)	20.6	(40)	20.0	(7)
6	26.5	(61)	28.4	(55)	17.1	(6)
7	46.1	(106)	43.3	(84)	60.0	(21)

TABLE 1 (continued)

Characteristic	Total		Men		Women	
	% <sup>b</sup>	N	% <sup>b</sup>	N	% <sup>b</sup>	N
<u>Law school has a sex-based discrimination course</u>						
Yes	63.8	(146)	65.1	(125)	55.6	(20)
No	31.4	(72)	29.2	(56)	44.4	(16)
Don't know	4.8	(11)	5.7	(11)	0.0	(0)
<u>Perceived percentage of women students at law school</u>						
20-34%	18.7	(44)	18.7	(44)	19.4	(7)
35-44%	53.2	(125)	53.5	(106)	52.8	(19)
45-49%	12.8	(30)	10.6	(21)	22.2	(8)
Over 49%	15.3	(36)	17.2	(34)	5.6	(2)

<sup>a</sup> N's vary by category according to the number of responses to each question. One person did not respond to the question about sex. N's on the other questions range between 223-238 for the total group; 189-201 among males; 34-36 among female respondents.

<sup>b</sup> Percentages are calculated based on substantive responses. Don't know/no answer responses are not included in the percentage distribution except on the question about sex-based discrimination courses where "don't know" has substantive implications.

As Table 1 indicates, most criminal law professors who returned our questionnaire were educated in the late 1960s or later; have taught criminal law for varying lengths of time, but practiced it little; and believe social and political concerns are important in the teaching of law. They are more likely than not to teach in a law school with a sex-discrimination course and most likely to teach at law schools with an estimated 35-44% female student body.<sup>23</sup>

The 15% of the sample who are women have received their law degrees more recently,<sup>24</sup> have shorter teaching and

23. The mean of 39.6% reported by our sample is almost identical to the national figure (1985) of 40% of full-time law students who were women. See 1985 REVIEW OF LEGAL EDUCATION, *supra* note 22, at 65.

24. Almost 90% of female respondents have received their law degrees since 1970,

practice careers, attach slightly more importance to social and political concerns, and are less likely than their male counterparts to teach at schools with sex-based discrimination courses.<sup>25</sup>

Virtually all (96%) of the professors surveyed report criminal law to be a required course. Seven of the ten faculty members from schools that do not require criminal law indicate that most students take it anyway. Ninety-five percent of the law schools requiring the course require it in the first year, and it is usually (94%) a one-semester course.

## II. COVERAGE OF GENDER-RELATED TOPICS

Table 2 reports data on coverage of gender-related topics, indicating whether the topic is covered and the amount of time devoted to it (although not all respondents answered the question about time). Table 3 orders the topics by the percentage of professors in the sample who cover the topic.<sup>26</sup> We discuss the gender-related topics one by one, then consider teaching priorities evident in patterns of coverage.

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compared to 47% of the men. This gender gap in professional age is a consequence of the recent dramatic movement of women into the major professions and characterizes other professions as well. Cf. Lamanna, Miller & Moore, *Women Sociologists in the Midwest: A Status Update*, 28 SOC. Q. 423, 427 (1987) (discussing female professors in sociology departments); COMMITTEE ON THE STATUS OF WOMEN, ORGANIZATION OF AMERICAN HISTORIANS, *ASSESSING THE PAST, LOOKING TO THE FUTURE* 5 (1986) (available through the Organization of American Historians) (discussing female historians).

25. The list of schools indicates that it tends to be the more prestigious law schools that offer sex-discrimination courses, perhaps because they are better-endowed and can afford specialized courses. Women are less likely to be on the faculties of these schools. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 549 & n.65 (1988). Professor Emma Coleman Jordan, past president of the Society of American Law Teachers, notes that, "[f]orty-one percent of the prestige schools have less than 12 percent of the teaching slots filled by women." Weisenhaus, *Women Lawyers: Progress in Slow-mo*, MS., April, 1988, at 73, 74.

26. Because responses to the question *why* a topic was not included in a course were often incomplete, they are not analyzed systematically. Most often, the reason given was that the topic was not considered as important as other topics, perhaps a redundancy in view of its omission. Table 10, in Appendix A, lists the reasons for noncoverage checked by professors who do not cover each topic. Table 11, also in Appendix A, provides a breakdown of topic coverage by the sex of the professor.

TABLE 2  
COVERAGE OF GENDER-RELATED CRIMINAL LAW TOPICS

Topic	% Who Cover Topic <sup>a</sup>	Average Time Minutes <sup>b</sup>	N <sup>c</sup>
Killing of fetus as homicide	83.5	95	(165)
Abortion	52.4	92	(98)
Conspiracy between spouses	37.8	35	(65)
Battering by spouses	69.5	86	(120)
Self-defense by battered women	81.0	85	(145)
Reasonableness and gender	67.0	108	(110)
Wife's misconduct as provocation	66.5	65	(109)
Rape: Elements	86.3	101	(138)
Rape: Mistake-of-fact defense	94.9	90	(157)
Rape: Diminished-capacity defense	53.1	71	(78)
Rape: Death penalty	48.9	47	(73)
Rape: Potential victims	68.4	49	(99)
Statutory rape: Elements	84.3	59	(126)
Statutory rape: Mistake-of-fact defense	89.8	69	(143)
Sexual harassment	10.8	45	(18)
Failure to act	92.7	108	(155)
Gender: Sentencing standards	13.5	35	(29)
Gender: Capital punishment	17.3	32	(29)
Gender: Treatment of victims/witnesses	24.3	60	(38)
Gender: Culpability of accomplices	19.9	83	(31)
Prosecutorial discretion: "Turning"	16.1	79	(23)
Marital duress	34.5	39	(55)
Prostitution: Elements	25.2	53	(40)
Prostitution: Criminalization	46.4	47	(76)
Prostitution: Vagueness	33.5	51	(51)
Prostitution: Sanctions on "johns"	32.9	32	(52)
Pornography	21.8	61	(38)
PMS defense	30.1	40	(52)
Ways to correct sex discrimination in laws	21.9	89	(29)

<sup>a</sup> Not all questions were answered by all respondents. Because at least 224 responded to questions about whether a topic was covered, Ns are not reported.

<sup>b</sup> Average time spent covering the topic is calculated on the responses of faculty who do cover the topic. Evaluation of the relative importance of the topic in terms of time spent on the topic should take into account the fact that some professors spend no time on the topic and others have not reported their time.

<sup>c</sup>Low response rates to questions about time made it essential to report these Ns.

TABLE 3  
RANK ORDER OF GENDER-RELATED CRIMINAL LAW TOPICS  
BY COVERAGE

Rank	% Covering Topic	Topic
1	94.9	Rape: Mistake-of-fact defense
2	92.7	Failure to act
3	89.8	Statutory rape: Mistake-of-fact defense
4	86.3	Rape: Elements
5	84.3	Statutory rape: Elements
6	83.5	Killing of fetus as homicide
7	81.0	Self-defense by battered women
8	69.5	Battering by spouses
9	68.4	Rape: Potential victims
10	67.0	Reasonableness and gender
11	66.5	Wife's misconduct as provocation
12	53.1	Rape: Diminished-capacity defense
13	52.4	Abortion
14	48.9	Rape: Death penalty
15	46.4	Prostitution: Criminalization
16	37.8	Conspiracy between spouses
17	34.5	Marital duress
18	33.5	Prostitution: Vagueness
19	32.9	Prostitution: Sanctions on "johns"
20	30.1	PMS defense
21	25.2	Prostitution: Elements
22	24.3	Gender: Treatment of victims/witnesses
X	21.9	Ways to correct sex discrimination in laws
23	21.8	Pornography
24	19.9	Gender: Culpability of accomplices
25	17.3	Gender: Capital punishment
26	16.1	Prosecutorial discretion: "Turning"
27	13.5	Gender: Sentencing standards
28	10.8	Sexual harassment

### *A. Killing of Fetus as Homicide*

The legal status of feticide is one of the most frequently covered topics, treated by 83.5% of respondents for an average of one and one-half hours. This attention may derive from the significance of homicide in a criminal law class: in responses

to open-ended questions about class content, homicide was the most frequently cited substantive crime.<sup>27</sup>

Another reason for interest in this topic may be the spurt of legislation and litigation addressing the legal status of the fetus.<sup>28</sup> This activity arises from two sources: concern about fetal death from egregious negligence or assault, and the antiabortion effort to incorporate a doctrine of fetal personhood into the law.

In regard to the first concern, courts have ruled that however grave the circumstances of fetal death, under the common law an infant must be born alive to be considered a person, and hence a homicide victim.<sup>29</sup> The Supreme Court's decision in *Roe v. Wade*<sup>30</sup> nullified most state laws that might have defined abortions performed at the request of the pregnant woman as homicide, but the Court has never ruled that destruction of the fetus by a third party without the consent of the pregnant woman may not be criminalized. Thus, some states have moved to define feticide by someone other than the pregnant woman or her doctor as homicide or a lesser crime.<sup>31</sup>

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27. We asked responding professors: "What substantive crimes does the [criminal law] course cover?" Homicidal or murder was listed by 183; the next highest were rape/sexual assault, listed by 98, and theft, listed by 57.

28. Personal communication, Diana Traub, ACLU Reproductive Freedom Project, March 8, 1988; see, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). For reviews of law in this area, see Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); N. Hunter, *Feticide—Cases and Legislation* (May 5, 1986) (American Civil Liberties Union Reproductive Freedom Project Memorandum, on file with the *University of Michigan Journal of Law Reform*); N. Hunter, *State Legislation Concerning 'Feticide' and Wrongful Birth/Wrongful Life* (Apr. 15, 1983) (American Civil Liberties Union Reproductive Freedom Project Memorandum, on file with the *University of Michigan Journal of Law Reform*).

29. *E.g.*, *Keeler v. Superior Ct.*, 2 Cal. 3d 619, 625, 87 Cal. Rptr. 481, 483-84, 470 P.2d 617, 620 (1970). *Keeler* was displaced by an act of the California state legislature that amended the state penal code to include the unlawful killing of a fetus within the definition of murder. See 1970 Cal. Stat. ch. 1311, amending CAL. PENAL CODE § 187. Section 187 was later found to be constitutional only as applied to viable fetuses. See *People v. Smith*, 59 Cal. App. 3d 751, 757, 129 Cal. Rptr. 498, 502 (1976).

30. 410 U.S. 113 (1973).

31. See, e.g., 1986 Minn. Laws 388 (effective Aug. 1, 1986), codified at MINN. STAT. § 609.2661-.2665 (1990). This created the crimes of murder and manslaughter of an unborn child, following the unsuccessful attempt to prosecute under the homicide laws in *State v. Soto*, 378 N.W.2d 625 (Minn. 1985).



## B. Abortion

Abortion is covered by about half (52.4%) of the respondents, for an average time of one and one-half hours. One might ask why abortion would continue to be covered if few people are now charged with the crime.<sup>32</sup> However, although the Supreme Court in *Roe v. Wade* and some subsequent decisions<sup>33</sup> greatly restricted the power of the states to criminalize abortion, it is still a crime if performed contrary to state laws regulating, for example, place, licensing, length of pregnancy, or consent.<sup>34</sup>

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32. No criminal prosecution under an abortion statute appears to have occurred from *Simopoulos v. Virginia*, 462 U.S. 506 (1983), through 1988. Personal communication, Diana Traub, ACLU Reproductive Freedom Project, March 8, 1988. In 1989, however, a Pennsylvania physician was convicted of infanticide under the state's abortion law and is appealing. *Obstetrician Found Guilty of Infanticide*, L.A. Times, June 12, 1989, at A2, col. 3.

33. *E.g.* *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking down a Pennsylvania informed consent statute); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (striking down an ordinance making it a misdemeanor to perform an abortion without obtaining informed consent); see also *Ohio Curb on Abortions Is Struck Down*, N.Y. Times, Aug. 13, 1988, at A6, col. 1.

34. For example, in *Thornburgh*, the section of Pennsylvania law criminalizing postviability abortions was not considered by the Supreme Court and thus stands. 476 U.S. at 758 n.9. The Supreme Court's recent decision in *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989), subsequent to this survey, is likely to alter the situation in unpredictable ways. For example, the state of Louisiana attempted to revive and enforce its 1855 criminal abortion law following the *Webster* decision. Marcus, *Louisiana Moves Against Abortion*, N.Y. Times, July 8, 1989, at A7, col. 4. A panel of federal judges enjoined the state's attempt on the grounds that the legislature had effectively repealed it in 1978 by passing guidelines for legal abortions. *1855 Louisiana Law on Abortion is Barred*, N.Y. Times, Jan. 29, 1990, at A17, col. 1.

The Supreme Court recently decided two cases involving notification of parents of minors seeking abortions: *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (holding that a 48-hour waiting period between notice and performance of abortion is constitutional); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (holding that the Ohio parental notification requirement coupled with a judicial bypass procedure was constitutional). In addition, in *Ragsdale v. Turnock*, 734 F. Supp. 1457 (N.D. Ill. 1990), the court granted a joint motion for a consent decree that enjoins the enforcement of certain Illinois statutes that were alleged to require that abortions be performed only in hospitals or their functional equivalent. The consent decree permits clinical abortions to be freely obtained. *Id.* at 1461.

For further discussion of abortion-related issues, see B. MILBAUER, *THE LAW GIVETH* (1983) and *REPRODUCTIVE LAWS FOR THE 1990S* (S. Cohen & N. Taub eds. 1989); see also *Special Double Issue: Webster v. Reproductive Health Services—Selected Amicus Briefs*, 11 WOMEN'S RTS. L. REP. 153-536 (1989) (devoted to *Webster* briefs favoring abortion rights).

Because *Roe v. Wade* is framed in terms of a constitutional right to privacy,<sup>35</sup> the majority of the 103 professors who explain why they do not include abortion in their criminal law class suggest that it belongs in constitutional law. A quarter of those not covering abortion simply say that it is not as important as other topics.

The topic of criminal abortion laws presents an opportunity for analytical reflection from several perspectives. From a feminist perspective, it demonstrates the social control of women through law. From an antiabortion perspective, it exemplifies the erosion of legal protection for the socially dependent. Generally, it provides an example of the changing relationship between law and morality. Although change is uneven,<sup>36</sup> the last two decades reveal an important shift from the regulation of sexual and reproductive behavior to the conceptualization of such behavior as involving constitutionally protected private choices.<sup>37</sup>

### C. Conspiracy Between Spouses

At common law, one spouse could not be convicted for conspiring with the other, on the theory that husband and wife are legally one person (the doctrine of unity).<sup>38</sup> In 1960, the Supreme Court held that the common law spousal conspiracy rule would no longer be applied in the federal courts,<sup>39</sup> and most states have followed suit, abrogating the unity doctrine in this context as well as others.<sup>40</sup>

Regardless of the apparent significance of a decision that acknowledges the legal autonomy of married women, less than half (37.8%) of our sample of professors include conspiracy

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35. 410 U.S. 113, 152 (1973).

36. Compare *Roe*, 410 U.S. at 147-64 with *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (holding that criminal law proscribing homosexual conduct is not unconstitutional) and with *Michael M. v. Superior Ct.*, 450 U.S. 464, 472-76 (1981) (holding that statutory rape laws that penalize only males are not unconstitutional).

37. See L. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 10-26 (1990); S. WALKER, *IN DEFENSE OF AMERICAN LIBERTIES* 300-04 (1990).

38. See L. GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN* 232 (1988).

39. *United States v. Dege*, 364 U.S. 51, 54-55 (1960).

40. See, e.g., *People v. Lockett*, 25 Cal. App. 3d 433, 102 Cal. Rptr. 41 (1972); *State v. Pittman*, 124 N.J. Super. 334, 306 A.2d 500 (1973); *Commonwealth v. Lawson*, 454 Pa. 23, 309 A.2d 391 (1973).

between spouses in their criminal law course. Of those who did *not* include the topic, 73% characterize it as not as important as other topics. We conclude that the passing of the unity-of-persons doctrine is probably so taken for granted that coverage seems unnecessary. It could, nevertheless, prove useful to a discussion of the topic of conspiracy more generally.

#### *D. Spouse Abuse*

Legal issues related to conjugal violence are covered by a large majority of the responding professors. Almost 70% cover battering by spouses, spending almost one and one-half hours on the topic. Self-defense by battered women is covered by 81% of the sample, who allocate a similar amount of time to it.

Inclusion of spouse abuse in criminal law courses by so many professors indicates to us the influence of a feminist perspective<sup>41</sup> on conjugal violence. For years, prosecutors as well as the public treated spousal battery as normal behavior rather than assault.<sup>42</sup> Widespread coverage of spouse abuse in criminal law courses makes a statement to students and future prosecutors that conjugal violence is criminal behavior and that societal response should not be limited to therapeutic intervention. Nevertheless, of those who do not cover battering by spouses or self-defense by battered women, 46% and 34% respectively suggest that it is not as important as other topics.

#### *E. Relationship of Reasonableness to Gender*

Given the significance of the "reasonable man" concept in law, the relationship of reasonableness to gender is an important topic. Although the standard of reasonableness is usually grounded in the experience of the typical male, a challenge to this unstated assumption has emerged in the

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41. R. TONG, WOMEN, SEX AND THE LAW 124-52 (1984); FEMINIST PERSPECTIVES ON WIFE ABUSE (K. Yllo & M. Bograd eds. 1988).

42. See, e.g., Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1658-60 (1981).

context of the defense of battered women charged with the homicide of their batterers.<sup>43</sup>

Some of the questions that arise once a professor substitutes the reasonable woman for the reasonable man are: What force is reasonable for a typical woman to use against a typical battering male? Do her fists equal his fists? What constitutes imminent danger of harm? If he announces, after one beating, that he will "finish the job" later, is harm imminent? How realistic a protection is flight for a woman who has been repeatedly pursued and beaten?<sup>44</sup>

Two thirds of our sample consider the relationship of reasonableness to gender in their criminal law course, and those who do spend an average of 108 minutes on the topic, as much time as any topic receives. A majority of the fifty-nine responding professors who did not cover the issue indicated that it was not as important as other topics. Eight professors, all male, responded that they did not understand the question.

#### F. "Wife's Misconduct" as Provocation

"Wife's misconduct" as provocation refers to the reduction of culpability for a murder perpetrated by a man who views his wife having sex with another. This topic was covered by two thirds of the sample for about an hour on the average.

Some respondents commented on the "sexist" phrasing of the question; we do not know how this may have affected their responses. Although the wording was an error (it should have read "spouse's misconduct"), there is a sex bias issue regarding whether the standard of conduct relevant to excusing violence is different for females than for males for both victims and perpetrators. For example, future research should address whether the law still treats infidelity by husbands as less shocking to wives than infidelity by wives is to husbands, or considers male, but not female, violence in response to "provocation" normal behavior.<sup>45</sup>

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43. See Schneider, *supra* note 11, at 212.

44. See *id.* at 212-14 & n.113.

45. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 575-76 & n.28 (1972) (discussing the equal treatment of wives and husbands in the context of provocation by adultery and

### G. Rape

1. *Elements of the crime*—Rape is one of the most frequently included topics in the criminal law course. Elements of the crime are covered by 86.3% of the respondents, for an average time of just over one and one-half hours.

2. *Mistake-of-fact defense*—The central role of mens rea (loosely, criminal intent) in criminal responsibility is reflected in the almost universal coverage of the "mistake of fact" defense,<sup>46</sup> i.e. a claim by the defendant that he believed (perhaps erroneously, but in good faith) that the complainant consented. "Mistake of fact" has had a strategic role in a traditional defense to rape. If a woman said "no," a man could still claim he thought she meant "yes." Additionally, in many jurisdictions her nonconsent had to be demonstrated by resistance, even to the point of injury.<sup>47</sup> This contrasts with a contemporary perspective on consent to sexual contact<sup>48</sup> in

suggesting that traditional treatment was not always equal).

46. Conviction for most crimes requires that the prosecution prove that the defendant had the type of criminal intent required by the particular statute. Unfortunately, most of the cases typically used to teach the "mistake of fact" defense to a charge of rape are highly problematic from a feminist point of view. See Erickson, *Final Report*, *supra* note †, at 354-65 (discussing *Director of Pub. Prosecutions v. Morgan*, 1976 App. Cas. 182; *People v. Mayberry*, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975); and *United States v. Short*, 4 C.M.A. 437, 16 C.M.R. 11 (1954)). The mistake-of-fact cases bring out such issues as the subjective versus objective standard of reasonableness of assuming consent (if the accused believes there is consent, even though a reasonable person would not, is he guilty?) and the different burden of proof regarding mens rea required for a conviction for rape compared to that required to prove assault with intent to rape. See also R. TONG, *supra* note 41, at 96-98.

47. See *King v. State*, 210 Tenn. 150, 158, 357 S.W.2d 42, 45 (1962) ("[The female] must have resisted the attack in every way possible and continued such resistance until she was overcome by force, was insensible through fright or ceased resistance from exhaustion, fear of death or great bodily harm."); *People v. Serrielle*, 354 Ill. 182, 186, 188 N.E. 375, 377 (1933); see also S. ESTRICH, *supra* note 5, at 29-32.

48. Contemporary feminist views of rape and strategies for rape law reform vary. Some important issues are whether the crime should be conceptualized as rape, assault, or sexual assault, and whether the victim should be required to demonstrate lack of consent by physical resistance or whether her failure to give affirmative consent is sufficient, particularly if she was faced with threats or force. For a discussion of these issues in rape law reform and for data on current laws in the various states, see R. TONG, *supra* note 41, at 90-123; Searles & Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25 (1987) (discussing and breaking down of data on states' laws); J. MARSH, A. GEIST, & N. CAPLAN, *RAPE AND THE LIMITS OF LAW REFORM*, *supra* note 2.

which "the reasonable man in the 1980s should be one who understands that a woman's word is deserving of respect . . . ."<sup>49</sup>

Unfortunately, reports that professors include rape and the mistake-of-fact defense in criminal law classes do not tell us *how* the topics are covered. Lack of information about the content of coverage limits our interpretation of this data, but securing and analyzing course content in detail would have presented an insurmountable research challenge because of limits of time, money, and method. With regard to rape, future surveys might ask: (1) whether rape is conceptualized as a single continuum of rape/assault, (2) whether nonconsensual sexual touching should be classified as sexual assault; and (3) what perspective on marital rape is presented.<sup>50</sup>

3. *Diminished-capacity defense*—The diminished-capacity defense to a charge of rape refers to the reduced culpability of a perpetrator who lacks judgmental capacity because of a temporary or permanent disability, and hence is less capable of forming a mens rea or more likely to make an unreasonable mistake of fact. The diminished-capacity defense received much less attention from our respondents than the elements of rape or the mistake-of-fact defense; it was covered by a bare majority of responding professors.

4. *Death penalty for rape*—Less than half (48.9%) of the responding professors covered the death penalty for rape. One quarter of those indicating why they did not cover this topic believe that it belongs in another course (with no consensus on which course).<sup>51</sup> Most others claimed it was not important enough to be covered. As a result of *Coker v. Georgia*,<sup>52</sup> states virtually are precluded from constitutionally imposing the death penalty for rape.<sup>53</sup> The fact that the Supreme

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49. S. ESTRICH, *supra* note 5, at 97.

50. Unfortunately, marital rape, which we intended to include as a gender-related topic, was left off the questionnaire inadvertently, so we do not have data on whether this topic is covered in the criminal law courses taught by our respondents. Marital rape was covered, however, in the casebook reviews. See Erickson, *Final Report*, *supra* note †, at 364-71.

51. See *infra* page 246, Table 10. Only 15 out of 100 professors who do not cover the death penalty for rape answered this question. Choices were scattered over criminal procedure, constitutional law, women and law, sentencing, and death penalty, with no more than three professors naming any one course.

52. 433 U.S. 584 (1977).

53. *Id.* at 592 ("[A] sentence of death is grossly disproportionate and excessive

Court has addressed this issue would seem to indicate a high level of importance, but perhaps when responding professors indicated it was not "important" enough to be covered, they meant it was not "controversial" enough.

5. *Who can be a victim of rape*—More than two thirds of professors cover the issue of who can be a victim of rape. Questioning the traditional assumption that women are the sole victims of rape takes a sex-neutral perspective on the law, recognizing that men as well as women can be victims of rape; that victimization of young males is not uncommon; that adult males are also raped; and that women rape men and can be accomplices in male rapes of both males and females.<sup>54</sup> Many of the states have modified their laws to make them sex-neutral in classifying of offender and victim.<sup>55</sup> Although this move from a sex-based to a sex-neutral conceptualization of the crime is a major change, 30% of the sample does not include the topic in their courses.

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punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual.") (plurality opinion). Justice Powell, concurring in part and dissenting in part, indicated that the death penalty might be appropriate for "an outrageous rape resulting in serious, lasting harm to the victim." *Id.* at 604.

54. There has been a widespread but erroneous belief that it would be impossible for a female to rape a male because a male could not achieve or maintain an erection when threatened or attacked by a female. See Sarrel & Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES SEXUAL BEHAV. 117 (1982) (discussing actual sexual assaults of men by women). Sarrel and Masters mention that two of the men interviewed for their study were brought to their attention by attorneys. The attorneys initially did not believe the clients because they thought it was impossible for a man to respond sexually while under sexual attack by a woman. *Id.* at 130. The New York Court of Appeals has stated: "Although the 'physiologically impossible' argument has been accepted by several courts . . . it is simply wrong." *People v. Libertas*, 64 N.Y.2d 152, 169, 485 N.Y.S.2d 207, 217, 474 N.E.2d 567, 577 (1984) (citations omitted).

55. See, e.g., NEB. REV. STAT. § 28-317 to -320 (1989); N.M. STAT. ANN. § 30-9-11 to -13 (1984); OHIO REV. CODE ANN. § 2907.01-.06; R.I. GEN. LAWS § 11-37 (1981); UTAH CODE ANN. § 76-5-401 to -404 (1990). The trend to use sex-neutral language in rape law has been growing; Field and Bienen report that by the late 1970s, almost two thirds of the states had revised their statutes. See H. FIELD & L. BIENEN, *JURORS AND RAPE* 207-458 (1980). According to Searles and Berger, that reform continued; they claim that by 1985 "almost three-quarters of the states have adopted sex neutral terminology." Searles & Berger, *supra* note 48, at 28; see also Berger, Searles & Neuman, *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC'Y REV. 329 (1988) (providing an interesting analysis of patterns in state rape-law reform).

Not all feminists see the adoption of sex-neutral terminology for victim and offender as a desirable reform. See S. ESTRICH, *supra* note 5, at 81-83; R. TONG, *supra* note 41, at 90-92.

### H. Statutory Rape

Elements of the crime (84.3%) and the principal ("mistake of fact") defense (89.8) for statutory rape are among the most frequently included topics in the criminal law course. Our responding professors spend an average of an hour on elements of the crime and slightly longer on the "mistake of fact" defense. Those few who do not cover statutory rape most commonly explain that it is not important.

"Mistake of fact" in the statutory rape context refers to a situation where the defendant claims he mistakenly believed the victim to be above the age of consent.<sup>56</sup> Some feminist reformers, concerned for the protection of young females, favor eliminating this "mistake of age" defense, which has been described as one "used to assuage the guilt of male defendants while subjecting young females (particularly those who appear physically mature) to accusations of victim precipitation."<sup>57</sup> Other feminists are opposed to or ambivalent about strengthening statutory rape statutes because such protection also precludes a young woman from entering a consensual sexual relationship, to which she may be competent to consent. These feminists view statutory rape laws as more controlling than protective—and of course part of the law's historic role was protecting the female's chastity as valuable property.<sup>58</sup> Regarding exploitation versus choice in the sexual relations of minor women, much may depend on the comparative age and social power of the two parties. Recognizing that an age differential may cause a power imbalance, some statutes

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56. Many states allow a defense of reasonable "mistake of age," either by statute or by case law. *See, e.g.*, *State v. Guest*, 583 P.2d 836, 840 (Alaska 1978); *People v. Hernandez*, 61 Cal. 2d 529, 536, 393 P.2d 673, 677, 39 Cal. Rptr. 361, 365 (1964) (holding that a defense of mistake of age must be permitted, even though not in the statute); KY. REV. STAT. ANN. § 510.030 (Michie/Bobbs-Merrill 1990) ("defendant may prove in exculpation that at the time . . . he did not know of the facts or conditions responsible for such incapacity to consent"); WASH. REV. CODE § 9A.44.030(2) (1989). In some states, however, where the statutes do not provide a mistake of age defense, and courts have refused to allow such a defense. *See, e.g.*, *State v. Moore*, 105 N.J. Super. 567, 571-72, 253 A.2d 579, 581 (1969); *Vasquez v. State*, 622 S.W.2d 864, 866 (Tex. Crim. App. 1981).

57. *Id.* at 26 (footnote omitted).

58. R. TONG, *supra* note 41, at 113-14.



require an age gap between the defendant and the complainant.<sup>59</sup> Statutory rape statutes do not, however, address social power imbalances directly.<sup>60</sup>

As our survey indicates, statutory rape usually is included in a criminal law course, where it is both a traditional topic and one that permits classes to explore the changing sexual roles of women and men, and to consider whether "paternalistic" laws have a valid role to play in our society.

### I. Sexual Harassment

This topic was least likely (10.8%) to be taught by responding professors. We need to note, however, that responding professors varied in how they interpreted the term "sexual harassment." We intended the questionnaire item to refer to lesser sexual assaults, *e.g.*, unwanted touching, but many responding professors assumed that "sexual harassment" referred to sexually offensive or coercive verbal or physical behavior directed toward a woman at her workplace.<sup>61</sup>

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59. For examples of "age-gap" statutes, see N.Y. PENAL LAW § 130.30 & 130.25 (McKinney 1987) (providing that any person 18 years or older (2d degree rape) or 21 years or older (3d degree rape) may be guilty of rape if he or she engages in sexual intercourse with another person who is under the age of 14 (2d degree rape) or 17 (3d degree rape); MINN. STAT. ANN. § 609.342(a) & (b) (West 1988) (defining criminal sexual conduct with regard to a 36- or 48-month gap between the age of the victim and that of the perpetrator). For discussions of "age-gap" statutes, see Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 193-96 (1980) and Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387, 404, 411-12 (1984).

60. Other laws—for example those concerning incest, competence to consent, and sexual harassment—attempt to address social power issues in the sexual consent context. See Erickson, *Final Report*, *supra* note †, at 387-88.

61. A number of states include a statutory offense of "non-consensual touching" of intimate body parts. See, *e.g.*, N.Y. PENAL LAW § 130.55 (McKinney 1987) (a person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent); *id.* § 130.00(3) (defining sexual contact as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party"); OHIO REV. CODE ANN. § 2907.05 (Baldwin 1988) (defining the crime of "gross sexual imposition"); UTAH CODE ANN. § 76-5-404 (1990) (defining the crime of "forcible sexual abuse"); see also Searles & Berger, *supra* note 48, at 28, 32 (table 3). Sexual harassment in the workplace is defined more broadly to include, for example, verbal harassment, coercion of sexual acts through threats of job retaliation or offers of advancement, and

Most of those who did not cover sexual harassment (44.6%) thought that it belonged in another course, commonly sex discrimination or employment discrimination. Responding professors may have mistakenly thought that workplace sexual harassment is not a crime. In fact, much employment-related sexual harassment is criminal behavior, for which a victim may seek both criminal and civil sanctions.<sup>62</sup> As with other topics, substantial proportions thought that it was not important (32.2%) or that coverage by the casebook was inadequate (23.2%).

### *J. Failure to Act*

Although criminal laws are commonly negative in form and interdict certain behaviors, failure to perform certain societally prescribed duties may also be criminalized.<sup>63</sup> The questionnaire listed "child neglect" as a specific application of "failure to act."

Although the relevant statutes are generally sex-neutral, "failure to act" is a gender-related topic because the *mother's*, rather than the father's, responsibility to protect and nurture the child is usually at issue in everyday applications of the law. The mother may be single, but even if married, she is socially designated as the primary parent. In addition, it may be the woman's partner, often the child's father or stepfather,

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the existence of a work environment that is intimidating and stressful because of sexual jokes and innuendos. Sexual harassment is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988). See *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 63-67 (1986) (holding that hostile environment sexual harassment is actionable as sex-discrimination under Title VII, and citing Title VII and applicable EEOC guidelines); see also EEOC Guidelines, 29 C.F.R. § 1604.11 (1991).

62. See generally R. TONG, *supra* note 41, at 71-86 (discussing criminal law, tort, and extralegal means of addressing the problem of sexual harassment).

63. See, e.g., *Commonwealth v. Konz*, 498 Pa. 639, 644, 450 A.2d 638, 641 (1982) (discussing parent's duty to care for child); *Westrup v. Commonwealth*, 123 Ky. 95, 97, 93 S.W. 646, 646 (1906) (noting husband's duty to summon medical aid for wife who is helpless); *State v. Benton*, 38 Del. 1, 15, 187 A. 609, 615 (1936) (discussing duty of railroad gatekeeper to vehicle drivers to lower gate when train is approaching).

from whom the child needs to be protected.<sup>64</sup> Attributing responsibility in such situations raises issues of social power: What are the options of a woman with a violent partner? Can she protect the child?<sup>65</sup> Are the limited financial resources of many single women the root cause of the facts leading to a neglect case? The attribution of responsibility can be clouded by gender differentials in power and options even when the mother is the abuser:

[D]efending women against violence is so urgent that we fear women's loss of status as political, deserving "victims" if we acknowledge women's own aggressions

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... Indeed, child abuse becomes the more interesting and challenging to a feminist because in it we meet women's rage and abuses of power. Furthermore, child abuse [here failure to act to protect a child against abuse or neglect] is a gendered phenomenon, related to the oppression of women, whether men or women are the culprits, because it reflects the sexual division of the labour of reproduction. . . . [W]omen are always implicated because even when men are the culprits, women are usually the primary caretakers who have been, by definition, in some ways unable to protect the children. When protective organizations remove children or undertake supervision of their caretakers, women often suffer greatly, for their maternal work is usually, trying as it may be, the most pleasurable part of their lives.<sup>66</sup>

Criminalization of failure to act was the second most

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64. See, e.g., *People v. Lopez*, 206 Cal. Rptr. 860, 862 (1984) (not officially published); *Palmer v. State*, 223 Md. 341, 343, 164 A.2d 467, 468 (1960); *State v. Walden*, 306 N.C. 466, 469-71, 475-77, 293 S.E.2d 780, 783-84, 786-87 (1982).

65. Erickson, *Battered Mothers of Battered Children: Using our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, 1A CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL & ETHICAL ISSUES 195 (forthcoming 1991).

66. Gordon, *Feminism and Social Control: The Case of Child Abuse and Neglect*, in *WHAT IS FEMINISM?* 63, 68-69 (J. Mitchell & A. Oakley eds. 1986).

frequently included topic in the survey (92.7%) and tied with "reasonableness and gender" for the largest amount of time (108 minutes).

### *K. Gender Differentials in the Criminal Justice System*

An array of items concerning gender differentials in the operation of the criminal justice system were included in our questionnaire, but these tended to be infrequently covered. Only 13.5% of professors surveyed covered gender differentials in sentencing standards; 17.3%, gender differentials in capital punishment; 24.3%, treatment of victims and witnesses in the criminal justice system; 19.9%, degrees of culpability of accomplices, and 16.1%, prosecutorial discretion regarding who to "turn" against whom. Those few professors who did cover these topics spent an average of thirty minutes on sentencing standards and capital punishment and an hour or more on treatment of victim and witnesses, culpability of accomplices and prosecutorial discretion in "turning."

Poor or nonexistent coverage in the casebook was offered as a reason for omission by 20-25% of the sample, and an additional 40-45% considered most of these items "not as important" as others. Many (ranging from 30-42%), indicated that these topics (including sentencing) belonged in another course, such as criminal procedure or criminal justice.

However logical this division may seem, it excludes important gender-related issues from the criminal law class. The treatment of female victims and witnesses in rape cases, for example, is extremely important. Prosecution of rape was deterred for years by aggressive and demeaning treatment of victims.<sup>67</sup> Moreover, gender differences in sentencing stan-

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67. See, e.g., Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-15 (1977). Many states have passed "rape shield" laws limiting inquiry into the victim's sexual history and have undertaken evidentiary reforms or rethought legal concepts of rape and consent issues. See, e.g., ILL. REV. STAT. ch. 38, para. 115-7 (1989); N.D. CENT. CODE § 12.1-20-14 to -15 (1985); OHIO REV. CODE ANN. § 2907.02(D) (Baldwin 1986); OR. REV. STAT. § 40.210 (1989); W.Va. Code § 61-8B-1 (1989); see also Galven, *Shielding Rape Victims in the*

dards were common. Although these differences generally were assumed to favor women,<sup>68</sup> the difference frequently disadvantaged them seriously.<sup>69</sup> Expectations of differential sentencing can affect charging and plea bargaining, shaping the criminal law in certain directions through its practice. For these reasons, further research should study the criminal procedure course in order to determine whether these topics are, in fact, covered in criminal procedure, where many criminal law teachers suggest they belong.

Culpability of accomplices presents an especially discounted criminal law issue in that fully 60% of the 151 professors who do not cover it consider it relatively unimportant, while 15% would transfer it to another course. The myth that female perpetrators are always under the control of co-acting males would seem to be the essence of sexism, based as it is on stereotypes of women's passivity. However, recent attention to the issue of battered spouses should alert us to the fact that for many women male domination and coercion are not myths.<sup>70</sup> The paradoxical quality of this topic may

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*State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986); Searles & Berger, *supra* note 48, at 28-29, 36 (table 8), 37 (table 9), 38 (table 10). But the reforms and their impact may be somewhat limited. Searles & Berger, *supra* note 49, at 29; *see also* S. ESTRICH, *supra* note 5, at 80-91; J. MARSH, A. GEIST & N. CAPLAN, *supra* note 2, at 106-07; Spohn & Horney, *A Case of Unrealistic Expectations: Rape Law Reform in Illinois* (forthcoming, *Criminal Justice Policy Review*, Vol. 3(4) (1990)).

68. *See, e.g., Note, Sentencing Women: Equal Protection in the Context of Discretionary Decisionmaking*, 6 WOMEN'S RTS. L. REP. 85-87 (1980) (authored by Marianne Popier).

69. Until the 1970s, New Jersey, Connecticut, and Pennsylvania permitted differential sentencing that disadvantaged women who were given indeterminate sentences and held ineligible for earlier parole for good behavior or who were sentenced mandatorily to the maximum for the crime. *See, e.g., United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968) (holding unconstitutional a statute requiring a woman to be sentenced to an indefinite term, potentially longer than the maximum sentence for men for the same offense); *State v. Chambers* 63 N.J. 287, 307 A.2d 78 (1973) (holding statute requiring women to be sentenced to an indefinite term where male offenders convicted of the same offense would be sentenced to minimum-maximum term violated 14th amendment); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) (holding that statutory requirement of longer prison sentences for women than for men convicted of the same crime violates equal protection); *see also* B. DECKER, *THE WOMEN'S MOVEMENT* 243-46 (3d ed. 1983).

70. Nicolette Parisi has discussed and presented data concerning the roles of women and men in crime. Discussing prior sex-role studies, she concludes "[I]t is impossible to discern the particular relationship of the female criminal with her partner. Whether females were subservient when acting in concert with males

thus warrant its continued consideration in the criminal law course.

### *L. Doctrine of Marital Duress*

The assumption that a woman who commits a crime in the presence of her husband was coerced by him presents a dilemma familiar in other areas of law and public policy such as pornography,<sup>71</sup> statutory rape,<sup>72</sup> or antenuptial contracts.<sup>73</sup> Although permitting an assumption of women's dependency and submission to male direction infantilizes women legally, an assumption of equal power, opportunity, and choice may fly in the face of social and economic reality. Empirically, wives often are economically dependent on their husbands (even if both are employed) and do have less power in relationships.<sup>74</sup> Protective law is attractive, yet defining the woman as powerless undercuts her agency and, moreover, is not true in many cases.

Most of our sample do not teach the marital duress theory; only one third cover the topic. Perhaps it seems outmoded or unimportant; two thirds of those who did not include marital duress gave "not important" as their reason. Yet, as with culpability of spouses, the doctrine of marital duress could be used to raise the issue of the legal responsibility of women in a society that has formal goals of equality

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cannot be determined. However, recent evidence . . . consistently demonstrates that the traditional image of females as accomplices of males is erroneous." Parisi, *Exploring Female Crime Patterns*, in JUDGE, LAWYER, VICTIM, THIEF 111, 117-18 (N. Rafter & E. Stanko eds. 1982) (citation omitted). Nicole Rafter and Elizabeth Stanko discuss alternative images of women who are criminals. See JUDGE, LAWYER, VICTIM, THIEF 2-4 (N. Rafter & E. Stanko eds. 1982).

71. See R. TONG, *supra* note 41, at 7-36 (discussing pornography in general).

72. See *id.* at 90-123 (discussing rape in general).

73. See W. WADLINGTON, DOMESTIC RELATIONS—CASES AND MATERIALS 1114-39 (1978) (discussing antenuptial contracting in general).

74. Karen DeCrow discusses the ways that women have been in a position of economic dependency and unequal conjugal power and thus subject to coercion by their husbands. See K. DECROW, SEXIST JUSTICE 156-184 (1974); see also J. LIPMAN-BLUMEN, GENDER ROLES AND POWER 4-5 (1984); Gelles, *Abused Wives: Why Do They Stay?*, 38 J. MARRIAGE & FAM. 659 (1976); Gillespie, *Who Has the Power?: The Marital Struggle*, 33 J. MARRIAGE & FAM. 445, 445 (Aug. 1971).

but empirically continues to see considerable economic dependency of women.<sup>75</sup>

### *M. Prostitution*

Prostitution and pornography typically involve the commercial use of sexuality (usually women's) and are often termed "victimless" crimes.<sup>76</sup> With regard to law, prostitution and pornography present difficult choices between protecting powerless women and respecting women's rights to make decisions about the use of their bodies.<sup>77</sup>

Of course, some feminists have argued that laws against prostitution and the selective enforcement of such laws did not evolve to protect vulnerable women, but to proscribe women's behavior, which was considered immoral and role-inappropriate, while tacitly making allowances for the behavior of male customers.<sup>78</sup> Consequently, the question of criminal sanctions on "johns" (male customers) can be viewed as a gender-related issue. However, only one third of our respondents cover the differential enforcement of the law against prostitutes and their customers.

Elements of the crime of prostitution were covered by one-quarter of the responding professors, while one-third covered its vagueness. Whether or not prostitution should be criminalized appears to be of more teaching interest than the crime itself; almost half discussed criminalization.

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75. See B. EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS & THE FLIGHT FROM COMMITMENT* (1983); A. HOCHSCHILD & A. MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

76. See, e.g., G. GEIS, *NOT THE LAW'S BUSINESS* 2, 173-221 (1979) (discussing prostitution as a "victimless" crime); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1026, 1049 (1974) (citing pornography as an example of a "non-victim" crime); cf. Comment, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments*, 55 UMKC L. REV. 263, 268 (1987) (authored by Virginia M. Giokaris) ("Notwithstanding recent judicial pronouncements, the attitude persists in some circles that pornography is a 'victimless crime,' not worthy of severe punishment such as imprisonment.").

77. Cf. R. TONG, *supra* note 41, at 6-64; Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN'S RTS. L. REP. 99, 99 (1989).

78. See, e.g., Cooper, *supra* note 77, at 101-08.

Of those who did not cover prostitution-related topics, two thirds or more gave as their reason in each case that these were not important subjects. While feminists, as well as others, may disagree on the appropriate social policy regarding prostitution, feminists generally favor the decriminalization of prostitution.<sup>79</sup> As long as prostitution has not been decriminalized, however, it could profitably be included in the criminal law course as an example of gender inequity. It raises, as well, the general issue of the criminalization of sexual behavior that is defined socially as deviant.

### N. Pornography

Professors devoted little attention to pornography; less than a quarter of the sample covered it. Of those who do not cover pornography, 42% think it belongs in another course, most commonly constitutional law, while 43% state that this is not as important a topic as others.

Attempts to prosecute under obscenity laws declined after the 1973 *Miller* decision.<sup>80</sup> Currently, the more visible legal activity regarding pornography centers on a civil law approach developed by Catherine MacKinnon and Andrea Dworkin, who conceptualize pornography as a violation of women's civil rights.<sup>81</sup> Other feminists oppose those efforts legally to restrict pornography.<sup>82</sup> As with prostitution, both groups of

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79. See R. TONG, *supra* note 41, at 55. Feminists disagree, however, on how prostitution should be regulated. *Id.* at 56-58; see also Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75 (1989-90).

80. *Miller v. California*, 413 U.S. 15 (1973); see Project, *An Empirical Inquiry into the Effect of Miller v. California on the Control of Obscenity* 52 N.Y.U. L. Rev. 810, 866-67, 870-77 (1977)); see generally S. WALKER, *supra* note 37, at 235-36.

81. See, e.g., Dworkin, *Pornography is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REF. 55 (1987-88); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 1-2 (1985).

82. See, e.g., Nan Hunter and Sylvia Law, *Brief amici curiae of Feminist Anti-Censorship Task Force (F.A.C.T.), et al., American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), reprinted in 21 U. MICH. J.L. REF. 69, 76-136 (1987-88); Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in PLEASURE AND DANGER 1 (C. Vance ed. 1984); Blakely, *Is One Woman's*



feminists tend to oppose criminalization of pornography,<sup>83</sup> although they generally support enforcing of other laws that might be violated in the production of pornography.

### *O. Premenstrual Syndrome (PMS)*

PMS defense is a new legal doctrine. First presented in England in 1981 (successfully) and in the U.S. in 1982 (inconclusively),<sup>84</sup> it makes the claim that biological and psychological responses to the menstrual cycle are so powerfully in control of some women's behavior that defendants who suffer from PMS may have diminished responsibility for criminal acts. Whether PMS may have such a strong relationship to violent behavior is controversial in scientific circles.<sup>85</sup> Feminist responses to PMS defense also vary. Some argue that women's very real health problems should be recognized by the law. Others believe this construct perpetuates the myth that women are irresponsible because of "raging hormonal imbalance," they consider PMS a suspect diagnosis and a threat to the equal treatment of women.<sup>86</sup>

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*Sexuality Another Woman's Porno?*, MS., Apr., 1985, at 37; Tong, *Women, Pornography, and Law*, in 73 *ACADEME* 14, 18-20 (1987).

83. R. TONG, *supra* note 41, at 14-15.

84. *Regina v. Smith*, 1982 CRIM. L. REV. 531; *People v. Santos*, No. 1k046229 (N.Y. Kings Cty. Crim. Ct. filed Apr. 21, 1982). *Santos* was settled by plea bargain, so although the PMS defense was proposed, it was not tested. See Chait, *Premenstrual Syndrome & Our Sisters in Crime: A Feminist Dilemma*, 9 *WOMEN'S RTS. L. REP.* 267, 269-72 (1986) (discussing *Santos*).

85. For a leading statement of the medical case for PMS, see K. DALTON, *THE PREMENSTRUAL SYNDROME AND PROGESTERONE THERAPY* (1984) F and J. ENDICOTT, *PREMENSTRUAL CHANGES, SYNDROMES, AND DISORDERS* (1986) (a National Institute of Mental Health publication, on file with the *University of Michigan Journal of Law Reform*), which discusses conceptual and methodological issues in the study of PMS. Zimmerman, *The Women's Health Movement: A Critique of Medical Enterprise and the Position of Women*, in *ANALYZING GENDER: A HANDBOOK OF SOCIAL SCIENCE RESEARCH* 422, 446-52 (B. Hess & M. Ferree eds. 1987) criticizes the imposition of definitions of abnormality on women's bodily functions. J. WILLIAMS, *PSYCHOLOGY OF WOMEN: BEHAVIOR IN A BIOSOCIAL CONTEXT* 125-26 (3d ed. 1987) reviews the mixed evidence on the causes and effect of PMS, referring to "the protean nature of the disorder."

86. For a thorough discussion of PMS, its scientific merit, and legal implications from a feminist perspective, see Chait, *supra* note 84.

PMS will probably come to be defined very narrowly. For this and other reasons, use of the PMS defense to homicide, assault, theft, or other crime is likely to be limited. Only 30% of the responding professors cover PMS defense in their criminal law course. Although responding professors most commonly described the defense as unimportant, 34% cite its absence from the textbook as a reason for failing to cover it in class. Many criminal law books do cover the male-only XYY syndrome,<sup>87</sup> so the professors have available to them materials on a subject that could profitably be compared to PMS in considering defenses and mitigation.

### *P. Correcting Sex Discrimination*

In addition to questions about specific topics, respondents were asked a global question about their teaching of criminal law: "Do you cover in the course ways that sex discrimination in laws can be corrected?"

Only one fifth of our sample of criminal law professors report that they address issues of sex discrimination in law and how to correct that discrimination. Those who do, however, spend an average of an hour and a half, which is a significant amount of time relative to other topics.

Some of those who do not cover the subject reported that it was not well covered in the casebook (16.2%) or not as important as other topics (30.4%). But a majority of the 148 who indicated a reason for noncoverage thought that it belonged in another course, usually sex discrimination (or women and law) or constitutional law, but also employment discrimination and civil rights. Yet, as long as broad issues of sex discrimination are excluded from the criminal law course, areas of sex bias may remain unchallenged despite the incorporation into the curriculum of issues such as spouse abuse, which are of particular concern to women.

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87. See, e.g., J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *CRIMINAL LAW: THEORY AND PROCESS* 1135-37 (1974); R. SINGER & M. GARDNER, *CRIMES AND PUNISHMENT: CASES MATERIALS, AND READINGS IN CRIMINAL LAW* 923-24 (1989).

## III. PRIORITIES IN THE TEACHING OF CRIMINAL LAW

We have reviewed the coverage given to each gender-related topic by responding professors. Now let us step back and consider the whole. What are respondents' teaching priorities? In Table 3, gender-related topics are ordered according to the proportion of respondents who include the topic in their class.

Rape-related topics are included most frequently. The mistake of fact defense to rape (94.9%) and to statutory rape (89.8%) are the first and third most commonly taught topics, while the elements of the crimes of rape (86.3%) and statutory rape (84.3%) are also in the top five. But the question of who can be a victim of rape, which poses directly the issue of sex discrimination, is not included as often (68.4%); it ranks only ninth. The diminished-capacity defense (twelfth) and the death penalty for rape (fourteenth) are further down the list.

Criminalization of failure to act, exemplified by child neglect, ranks as the second most frequently taught gender-related topic (92.7%). The killing of a fetus as homicide is also among the most frequently taught topics (83.5%). These have in common the protection of children or potential children. However, these topics reflect different kinds of gender relevance. Criminal child neglect involves prosecuting a woman (or a man) for a perceived failure in the role of parent, while feticide involves both a need to redress parental loss and a need to protect a woman's reproductive capacity. Alternatively, feticide laws may represent a state's affirmation of the value of fetal life in an antiabortion context. If such is the case, statutes prohibiting feticide and failure to act can be clustered conceptually as child protection or can be seen to involve the social control of women, who are perceived as insufficiently protective of their offspring unless threatened with legal intervention.

Self-defense by battered women falls into the most frequently taught grouping of gender-related topics (81%). Other issues related to conjugal violence are covered by two thirds of responding professors. Coverage of conjugal violence represents an important modification of the criminal law curriculum, reflecting increasing societal awareness of spouse abuse.

The relationship between reasonableness and gender is a general issue in criminal law. To what extent is the "reasonable man" a gendered concept? Are typical male responses the standard for judging behavior? Should they be? Inasmuch as two thirds of respondents report that they address the issue of "reasonableness and gender," we can conclude that gender-consciousness has penetrated the criminal law curriculum in an important way.

The topics summarized above are taught by two thirds or more of responding professors. Abortion and the criminalization of prostitution fall into the midrange of coverage, included in criminal law classes by approximately half of survey respondents. Other prostitution-related topics are covered by only a third of the sample at most. Topics associated with sexual and reproductive morality, closely connected to cultural ideas about the social roles of women, have historically been targets of social control efforts. But in the last twenty-five years, evolving doctrines of equal protection and privacy have affected law in this area, transforming some of these topics into constitutional issues.<sup>88</sup> Although this trend has its limits and has not affected laws on prostitution as much as laws on abortion, attitudes *have* shifted away from the legal regulation of sexual behavior through the criminal law.<sup>89</sup>

Less likely to be included in the criminal law course are issues touching on the common law doctrine of coverture. The spousal-conspiracy doctrine (taught by 37.8%) and the marital-duress doctrine (34.5%) turn on a wife's lack of autonomy. The low frequency with which these doctrines are taught suggests that the professors have dropped them from the curriculum because they view the doctrines as no longer relevant.

PMS defense is included in less than one third of criminal law classes. Yet it raises significant sex-bias issues: the role of biology in defining women; the credence granted to women's descriptions of their bodily experiences; the social construction of gender concepts, rooted more in stereotype than in empirical

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88. See S. WALKER, *supra* note 37, at 300-04.

89. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), and Bowers v. Hardwick, 478 U.S. 186 (1986), may mark a significant reversal of this trend.

evidence; the danger to equality in differentiating men's and women's legal responsibility; and the feminist dilemma of a protective versus an empowering stance toward vulnerable women. As a novel defense which does not appear to be gaining widespread acceptance, the PMS defense could be ignored with a certain degree of justification. It also could be used effectively, however, to address various sex discrimination issues that are sure to arise for the practicing lawyer.

At the bottom of the list, covered by one quarter or less of the responding professors, are topics signaling sex bias in the operation of the criminal justice system. Given a premise that the law is not simply what exists on the books, but what happens in the legal system, failing to cover sex bias in the actual operation of the criminal law is a significant vacuum in classroom presentations. A survey of professors who teach criminal procedure rather than criminal law may need to be conducted to determine whether these topics are in fact covered, but in another course.

Pornography also is covered infrequently (by 21.8%). Sexual harassment is least frequently taught, addressed by only 10% of responding professors but because of confusion over defining the concept, it is difficult to draw any conclusions.

#### IV. VARIATION IN TOPICAL COVERAGE BY SEX AND LENGTH OF TEACHING CAREER

We hoped to learn from the survey whether variation exists in the coverage of gender-related topics in different teaching settings and whether variation is associated with certain characteristics of the professor.<sup>90</sup>

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90. Comparisons in Tables 5, 6, 7, 9, and 11 are presented as simple percentages, with no claim as to the statistical significance of these comparisons. Significance tests are inappropriate for this exploratory study based on a nonrandom sample. R. HENKEL, TESTS OF SIGNIFICANCE 76-88 (1976); Lipset, Trow & Coleman, *Statistical Problems*, in THE SIGNIFICANCE TEST CONTROVERSY 81 (D. Morrison & R. Henkel eds. 1970); Kendall, *Note on Significance Tests*, in THE SIGNIFICANCE TEST CONTROVERSY, *supra*, at 87; Labovitz, *The Nonutility of Significance Tests: The Significance of Tests of Significance Reconsidered*, 13 PAC. SOC. REV. 141, 141 (1970) Morrison & Henkel,

### A. Sex of Professor

Although assuming one-to-one correspondence between sex and legal philosophy would be simple-minded, one of the arguments for ensuring the participation of women and minorities in a profession is that they may bring to it an experience-based sensitivity to limitations of the established perspective. Thus, it would be informative to determine whether women address some or all gender-related topics to a greater extent than do men.

Table 4 presents the gender-related topics ordered by ratio of male-to-female coverage.<sup>91</sup> In Table 4, numbers larger than 1.000 signal topics more likely to be covered by male professors, while numbers less than 1.000 indicate those more frequently covered by female professors.

In examining sex differences, we must remember that as a consequence of the history of the profession, sex and length of career are overlapping categories; all but one of the women have been teaching law less than ten years. On the one hand, this convergence can be viewed as an interpretive problem, confounding the effects of two separate variables, which we disentangle in Table 5. On the other hand, one can argue that it is artificial to separate these attributes in the analysis, because they occur together in the empirical setting we wish to understand.<sup>92</sup> It is this conjunction of factors which shapes contemporary law schools and their teaching of gender-related topics.

As Table 4 indicates, the topic most likely to be covered by women but not men is the ways in which sex discrimination in

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*Significance Tests in Behavioral Research: Pessimistic Conclusions and Beyond*, in THE SIGNIFICANCE TEST CONTROVERSY, *supra*, at 305. Measures of association would be distorted by skewed distributions on many of the variables, see H. REYNOLDS, ANALYSIS OF NOMINAL DATA 50 (1977), and would add little information beyond that provided by inspection of the percentages.

The tables presented in this Article describe in a straightforward way the patterns of response found in this survey. No statistical inference is made to the entire population of criminal law professors, but these data do provide initial information about the coverage of gender-related topics by criminal law professors in varied social circumstances.

91. Table 11, in Appendix A, presents a topic-by-topic comparison of coverage by male and female respondents.

92. See H. BLUMER, SYMBOLIC INTERACTIONISM 27 (1969).

TABLE 4

RATIO OF MALE TO FEMALE COVERAGE  
OF GENDER-RELATED TOPICS

Topic	Ratio of M/F Coverage <sup>a</sup>
Prostitution: Elements	4.982
Gender: Culpability of accomplices	3.695
Prosecutorial discretion: "Turning"	3.140
Conspiracy between spouses	2.124
Sexual harassment	2.107
Rape: Diminished-capacity defense	1.867
Marital duress	1.653
Prostitution: Vagueness	1.586
Rape: Potential victims	1.575
Prostitution: Sanctions on "johns"	1.545
Abortion	1.297
Prostitution: Criminization	1.221
Gender: Capital punishment	1.210
Pornography	1.205
Statutory rape: Elements	1.197
Rape: Death penalty	1.097
Rape: Elements	1.082
Killing of fetus as homicide	1.048
Wife's misconduct as provocation	1.032
Gender: Treatment of victims/witnesses	1.008
Statutory rape: Mistake-of-fact defense	.980
Rape: Mistake-of-fact defense	.972
PMS defense	.967
Failure to act	.913
Self-defense by battered women	.894
Battering by spouses	.835
Reasonableness and gender	.805
Gender: Sentencing standards	.754
Ways to correct sex discrimination in laws	.720

<sup>a</sup>Ratio of % of male law professors who cover the topic to the % of female professors who cover the topic.

laws can be corrected. Although only a minority of either sex takes this critical perspective on criminal law, women are almost 40% more likely (28.6%) than men (20.6%) to do so. The difference between women professors and junior male professors is smaller (29.4% compared to 24.1%).<sup>93</sup>

93. Percentages for women are slightly different because this comparison is taken

Women are also more likely to cover the important conceptual issue of reasonableness and gender (80.0% compared to 64.4%). Moreover, more women than men professors have incorporated spouse abuse into their criminal law course (80.6% compared to 67.3%). They are more likely to include both battering by spouses and self-defense by battered women (88.9% compared to 79.5%).

Gender differentials in the criminal justice system are not systematically included by one sex more than the other, but there are sharp differences on individual items. Although neither group is very likely to cover these topics, women professors are more likely than men (17.1% compared to 12.9%) to cover gender differences in sentencing standards. Male professors are more than three times as likely to cover gender differences in culpability of accomplices (21.8% compared to 5.9%), in prosecutorial discretion in "turning" (17.9% compared to 5.7%), and are slightly more likely to cover gender differences in capital punishment (17.3% compared to 14.3%). There is little difference in coverage of treatment of victims and witnesses (24.4% compared to 24.2%).

Men are almost five times more likely than women to cover elements of the crime of prostitution (27.9% compared to 5.6%). They are generally more likely than women to cover laws concerning sexual conduct—prostitution, abortion, pornography, and statutory rape. In the case of abortion, senior male professors are especially more likely than women to cover the topic (63.6% compared to 40.0%).<sup>94</sup> Men are also much more likely to include the topic of criminal sanctions against male customers of prostitutes (34.3% compared to 22.2%).

Male professors more frequently include the topics of marital duress (36.7% compared to 22.2%) and conspiracy between spouses (41.2% to 19.4%). In fact, men cover more of the topics listed in the survey than do women; there are twenty topics more likely to be covered by men, compared with nine that are included more frequently by women.

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from Table 5, which did not include the female responding professor who has taught more than 10 years.

94. See Table 5, *infra* p. 229.



Several of these twenty topics relate to rape. Most notably, men more frequently cover who can be a victim of rape (72.0% compared to 45.7%),<sup>95</sup> and men are also almost twice as likely as women to cover the diminished-capacity defense (57.1% compared to 30.6%).

### *B. Length of Criminal Law Teaching Career*

The survey asked responding professors several questions about the length of their legal careers: year of graduation from law school; number of years spent teaching law; number of years teaching criminal law; and length of criminal law practice. Many respondents are experienced teachers of law. Almost one quarter have taught for over fifteen years, another 50% for more than five years, 27.3% for six to ten years, and 26.5% for eleven to fifteen years. Less than 10% have taught law only one or two years.

Careers in *criminal* law vary in length, but on the whole have been shorter. Over 40% of the respondents have taught criminal law for less than five years, including 19% who have taught it for only one to two years. Careers in practice have been rather limited: five years or less for three quarters of the respondents.

We need to recall that women law professors have had shorter teaching careers, with only one woman in the survey teaching for more than ten years. Consequently, to disentangle the relationship between sex and seniority, we have divided our sample into three groups: (1) men who have taught criminal law for more than ten years; (2) men who have taught criminal law for less than ten years; and (3) women who have taught criminal law for less than ten years.<sup>96</sup>

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95. Although rape law reform has moved in the direction of gender neutrality, some feminists oppose this trend. See *supra* note 55 and accompanying text. They fear that protection of women, the most frequent victims of rape, will be deemphasized, and they argue that "[w]hen women are the victims, gender is an issue that should not be avoided." S. ESTRICH, *supra* note 5, at 82; see also R. TONG, *supra* note 41, at 91; Williams, *supra* note 2, at 187.

96. Because no pattern could be inferred from a single case, the data from the woman respondent who has taught for more than 10 years was not included in this

Table 5 presents data on the relationship between sex, length of time respondents have taught criminal law, and topical coverage. Once the effects of sex and length of service

TABLE 5  
PERCENTAGE COVERING GENDER-RELATED CRIMINAL LAW TOPICS  
BY YEARS TAUGHT CRIMINAL LAW AND BY SEX

Topic	Years Taught Criminal Law		
	1-10		11 or more
	Female (N=35) <sup>a</sup>	Male (N=121) <sup>b</sup>	Male (N=78) <sup>c</sup>
Killing of Fetus as homicide	82.9	80.9	89.7
Abortion	40.0	48.3	63.6
Conspiracy between spouses	20.0	40.7	43.2
Battering by spouses	80.0	69.2	65.4
Self-defense by battered women	88.6	78.5	82.1
Reasonableness and gender	79.4	61.7	66.7
Wife's misconduct as provocation	66.6	66.9	67.6
Rape: Elements	80.0	83.1	94.8
Rape: Mistake-of-fact defense	97.1	93.3	97.4
Rape: Diminished-capacity defense	31.4	53.0	64.4
Rape: Death penalty	42.9	48.3	50.1
Rape: Potential victims	44.1	66.9	81.3
Statutory rape: Elements	71.4	83.5	92.3
Statutory rape: Mistake-of-fact defense	91.4	87.5	94.9
Sexual harassment	5.7	12.7	10.5
Failure to act	100.0	91.5	92.3
Gender: Sentencing standards	17.6	12.8	13.2
Gender: Capital punishment	14.7	19.3	14.4
Gender: Treatment of victims/witnesses	25.0	21.2	29.9
Gender: Culpability of accomplices	6.1	19.3	26.0
Prosecutor discretion: "Turning"	5.9	19.3	16.0
Marital duress	22.9	33.3	42.9
Prostitution: Elements	2.9	28.6	28.2
Prostitution: Criminalization	37.1	53.3	39.7
Prostitution: Vagueness	20.0	40.0	19.5
Prostitution: Sanctions on "johns"	22.9	34.4	35.1
Pornography	5.9	23.1	25.0
PMS defense	28.6	33.9	24.4
Ways to correct sex discrimination in laws	29.4	24.1	15.6

<sup>a</sup>Not every respondent answered every item. Ns range from 32-35.

<sup>b</sup>Ns range from 116-121.

<sup>c</sup>Ns range from 73-78.

analysis. She turned out to be Marina Angel, one of the Project Panel members. See *supra* note †. Her reflections on what it is like to be one of the first women law teachers is very worthy of attention. See Angel, *Women in Legal Education: What Its Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMPLE L. REV. 799 (1988).

are separated, few relationships between length of criminal law teaching career and inclusion of the various gender-related topics remain.

The topic of abortion, however, demonstrates such a difference. Less than 50% of men and women who have taught for fewer than ten years cover abortion, while close to two thirds of men who have taught for eleven or more years do include abortion. Because abortion largely was decriminalized by the decision in *Roe v. Wade*,<sup>97</sup> more recently trained lawyers may not consider it necessary to include abortion in a criminal law course. More senior professors may continue to include it.

Elements of rape are frequently included by all groups, but coverage by senior professors is almost universal (94.8%). They are also more likely to cover elements of statutory rape (92.3% compared to 83.5% of more male junior professors and 71.4% of female professors). This may represent simply a change in typical teaching method, although a sex difference is also apparent here.

Finally, professors who have been teaching criminal law for a shorter time are more likely than senior professors to include the umbrella topic "ways to correct sex discrimination in law" than more senior professors. This finding is not surprising, because the notions that the social bases of law and the uneven distribution of social power might be part of the law school curriculum are relatively new<sup>98</sup> in legal education.<sup>99</sup>

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97. 410 U.S. 113 (1973). *But see Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (holding that certain restrictions on abortion were not unconstitutional). *Webster* may be viewed as a departure from cases such as *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking down a Pennsylvania informed consent statute) and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (striking down an ordinance making it a misdemeanor to perform an abortion without obtaining informed consent).

98. With few exceptions, critical legal studies articles have publication dates in the mid- to late-seventies or later. *See Kennedy & Klare, A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461, 464-90 (1984). Also, younger professors may have received their undergraduate education during a period of curricular interest in social problems: that is, from the mid- sixties through the early seventies.

99. Table 5 disaggregates length of service and sex, permitting a few further observations that are not easy to present in the main text or to explain.

V. VARIATION  
IN TOPICAL COVERAGE  
BY TEACHING SITUATION

Situational characteristics investigated in this survey are: (1) perceived existence of a sex-based discrimination course in the law school curriculum; (2) perceived percentage of women students at the law school; and (3) perceived polarization of male and female students on the various topics.

*A. Sex Discrimination Course*

Table 6 presents data on coverage of gender-related topics by whether responding professors believe their school offers a sex-discrimination course. Data are presented separately for women and men; men are more likely (68.9% compared to 55.6%) than women to report that they teach at a school offering a sex discrimination course.<sup>100</sup> It is important to note that we included as "yes" responses in Tables 1 and 6 some individuals whose colleagues report that the school does *not* have a sex-based discrimination course. It may say something about the visibility of sex discrimination courses that eleven respondents (all male) did not know whether or not such a course was taught at their school and that an additional sixteen respondents contradicted others from the same school on this point.

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More junior male professors occupy an intermediate position between female professors and senior males regarding inclusion of several topics, *e.g.*, who can be a victim of rape, diminished-capacity defense to rape, and marital duress. As to coverage of some other topics, female professors and longer-serving males are similar in the frequency with which they include a topic, while junior male professors are distinct. Junior males are most likely to cover the following topics: gender differences in capital punishment, criminalization of prostitution, vagueness of prostitution laws, and PMS defense. Junior males are least likely to cover gender differences in treatment of victims and witnesses in the criminal justice system.

100. Because Table 1 included "don't know" responses, percentages differ slightly.

TABLE 6

COVERAGE OF GENDER-RELATED TOPICS  
BY WHETHER OR NOT SCHOOL OFFERS A SEX DISCRIMINATION COURSE  
AND BY SEX OF PROFESSOR

Topic	% Covering Topic			
	Male Course (N=124) <sup>a</sup>	No Course (N=56)	Female Course (N=20)	No Course (N=16)
Killing of fetus as homicide	84.7	78.6	75.0	87.5
Abortion	53.7	58.2	45.0	37.5
Conspiracy between spouses	41.3	45.3	15.0	25.0
Battering by spouses	71.3	63.6	90.0	68.8
Self-defense by battered women	79.8	80.4	95.0	81.3
Reasonableness and gender	69.2	49.1	94.7	62.5
Wife's misconduct as provocation	64.7	67.3	73.7	53.3
Rape: Elements	86.1	90.7	85.0	75.0
Rape: Mistake-of-fact defense	93.5	98.2	95.0	100.0
Rape: Diminished-capacity defense	50.8	73.6	40.0	18.8
Rape: Death penalty	53.3	43.4	35.0	56.3
Rape: Potential victims	70.2	79.2	42.1	50.0
Statutory rape: Elements	84.7	90.9	70.0	75.0
Statutory rape: Mistake-of-fact defense	88.6	94.5	90.0	93.8
Sexual harassment	9.9	14.8	5.0	6.3
Failure to act	91.8	89.1	100.0	100.0
Gender: Sentencing standards	9.9	14.8	31.6	0.0
Gender: Capital punishment	17.9	13.2	21.1	6.3
Gender: Treatment of victims/witnesses	26.0	20.4	41.2	6.3
Gender: Culpability of accomplices	21.0	25.9	5.6	6.3
Prosecutorial discretion: "Turning"	19.7	15.1	10.2	0.0
Marital duress	35.5	38.2	25.0	18.8
Prostitution: Elements	25.4	38.2	10.0	0.0
Prostitution: Criminalization	47.5	48.2	60.0	12.5
Prostitution: Vagueness	35.0	41.1	30.0	12.5
Prostitution: Sanctions on "johns"	31.1	39.3	35.0	6.3
Pornography	19.5	31.5	15.0	0.0
PMS defense	34.1	25.0	35.0	25.0
Ways to correct sex discrimination in laws	23.3	22.2	36.8	18.8

<sup>a</sup>Not all respondents answered all questions. N's ranged from 117-124 for male/yes; 53-56 for male/no; 17-20 for female/yes and 15-16 for female/no.

We asked about sex-discrimination courses because we suspected that the availability of these courses might provide a rationale for not covering gender-related topics in other courses, effectively ghettoizing such topics. Whether his law

school offers a sex discrimination course seems to make little difference, however, in much of the topical content of a male professor's criminal law class. Of those teaching at schools with a sex-discrimination course, for example, 23.3% cover ways that sex bias in laws can be corrected, while of those who teach at schools without such a course, 22.2% cover that topic.

There are a few exceptions. Men teaching at a school with a sex-discrimination course are much less likely (19.5% compared to 31.5%) to include pornography in their courses. They are less likely to cover elements of the crime of prostitution (25.4% to 38.2%) and the diminished-capacity defense to rape (50.8% to 73.6%). They are more likely, however, to include the important topic of gender and reasonableness (69.2% to 49.1%) and slightly more likely to cover PMS defense (34.1% to 25.0%). These topics represent: (1) recently articulated feminist issues (reasonableness, legal responsibility for rape, PMS defense) or (2) decriminalization of so-called victimless crimes involving the social control of women's sexuality through the criminal law.<sup>101</sup> We can speculate that teaching at a school with a sex-discrimination course may heighten male professors' awareness of a feminist perspective on the law in some important areas.

Presence or absence of a sex-discrimination course seems to have a stronger effect on women's coverage of gender-related topics. On eighteen of twenty-nine topics there is at least a ten percentage point difference in coverage between women teaching at schools with and without a sex-bias course, and often the difference is much larger than that.

Women teaching at schools that offer a sex-discrimination course are more apt to cover two key topics regarding sex bias: ways to correct sex discrimination in laws (36.8% compared to 18.8%) and reasonableness and gender (94.7% to 62.5%).

At a school with a sex discrimination course, female professors more often also cover spousal battering as a criminal offense (90.0% to 68.8%) and related issues such as self-defense by battered women (95.0% compared to 81.3%) and reasonableness and gender (94.7% to 62.5%). Additionally, they are more likely to include other topics that have to do

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101. Although feminists are divided on their legal approach to pornography and prostitution between a protective and an individual choice stance, there is strong support for decriminalizing women's commercial sexual activity. See R. TONG, *supra* note 41, at 55; DuBois & Gordon, *Seeking Ecstasy in the Battlefield: Danger and Pleasure in Nineteenth Century Feminist Sexual Thought*, in PLEASURE AND DANGER, *supra* note 82, at 31; Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER, *supra* note 82, at 267.

with gender and violence: wife's misconduct as provocation (73.7% compared to 53.3%) and PMS defense (35.0% to 25.0%).

Several topics related to gender differentials in the operation of the criminal justice system are covered more frequently by women teaching at a school with a sex discrimination course: gender differences in sentencing (31.6% compared to 0%); gender differences in the treatment of victims and witnesses (41.2% compared to 6.3%); and gender differences in capital punishment (21.1% compared to 6.3%). Women are less apt to cover the now virtually abolished death penalty for rape if they are at a school with a sex-discrimination course (35.0% compared to 56.3%).

For topics that are traditional specifications of crimes or defenses to them, the effect of teaching at a school with a sex-discrimination course differs for men and women. Women teaching at a law school with this course more frequently (40.0%) include the diminished-capacity defense to rape than do women at schools without such a course (18.8%), while the opposite is true for men (50.8% and 73.6%). Women at schools with a sex-discrimination course are respectively less likely to cover conspiracy between spouses, although it makes little difference to men's coverage of this topic.

At a school with a sex-discrimination course, women are more likely to cover some topics related to prostitution: criminalization of prostitution (60.0% compared to 12.5%); vagueness (30.0% compared to 12.5%); prosecution of "johns" (35.0% compared to 6.3%). For males, it makes no difference whether there is a sex-discrimination course for coverage of criminalization, while they are less likely to cover vagueness and prosecution of "johns" at a school with a sex-discrimination course. Male professors at a school without a sex-discrimination course and female professors at schools *with* such a course are more likely than their counterparts to cover pornography (31.5% compared to 19.5% and 15.0% compared to 0% respectively).

These differential patterns of coverage could result from different content of coverage. A professor can cover prostitution-related topics without questioning the assumption that prostitution is a crime, for example, or cover them critically, pointing out that the law functions as a social control device directed toward the sexuality of women. One might ascribe traditional reasons to professors with characteristics presumed to be more traditional (male, longer careers, teaching at a school without a sex-discrimination course) and feminist or critical reasons to professors with characteristics presumed to be less traditional (female,

younger professors, teaching at schools with sex-discrimination courses). This would explain why certain items are covered most frequently by men at schools without a sex-discrimination course (most traditional) and women at schools with a sex-discrimination course (most critical). Because no data on course content were collected, these inferences are purely speculative. It is less plausible to conclude that having a sex-discrimination course in place at a law school somehow causes women to be more traditional in their coverage.

Overall, one can conclude that if a sex-based discrimination course has any general effect, it is to encourage a feminist or critical perspective on the law in other parts of the curriculum. Rather than drawing off issues of sex bias from required core classes, sex-discrimination courses seem to create a climate in which broad issues of sex bias will be addressed throughout the curriculum.

In reaching this conclusion, we note that there could be other explanations for this association between existence of a sex-discrimination course and coverage of gender-related topics in a criminal law course. There may be something about the overall character of the law school, its intellectual and political climate, or its size and resources, that encourages both a sex-discrimination course and a critical or feminist perspective on the criminal law. It is also possible that the criminal law and sex-discrimination courses might be taught by the same person, giving them a commonality of perspective. We did not, however, ask respondents whether they also taught a sex discrimination course. It is worthy noting that most teachers of sex-discrimination courses are female,<sup>102</sup> so if a criminal-law teacher also teaches sex discrimination, that teacher is likely to be female.

### *B. Perceived Percentage of Women Students*

We considered that the presence of women in the classroom might affect professors' treatment of gender-related topics: certain issues might be made salient; comments and questions of women students might suggest avenues of inquiry, require consideration of feminist legal perspectives, or in other ways redirect the focus of learning.<sup>103</sup>

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102. C. EPSTEIN, *supra* note 9, at 233-35.

103. Assuming that sex determines philosophy and politics would be simplistic. Nevertheless, differences of socialization and advantage linked to sex, as well as



Table 7 presents data on the coverage of gender-related topics by perceived percentage of women law students.

TABLE 7  
COVERAGE OF GENDER-RELATED CRIMINAL LAW TOPICS  
BY PERCEIVED PERCENTAGE OF WOMEN STUDENTS

Topic	% Covering Topic When % Female Enrollment Is...		
	20-34% (N=44) <sup>a</sup>	35-44% (N=124) <sup>a</sup>	Over 45% (N=66) <sup>a</sup>
Killing of fetus as homicide	93.2	87.1	72.7
Abortion	52.3	55.5	47.0
Conspiracy between spouses	40.5	36.1	39.7
Battering by spouses	69.8	69.7	70.1
Self-defense by battered women	81.8	80.6	81.9
Reasonableness and gender	59.5	73.0	62.5
Wife's misconduct as provocation	51.1	63.0	83.9
Rape: Elements	88.6	89.3	81.5
Rape: Mistake-of-fact defense	100.0	94.2	92.4
Rape: Diminished-capacity defense	64.3	55.9	51.6
Rape: Death penalty	50.0	48.8	48.5
Rape: Potential victims	70.0	69.5	66.2
Statutory rape: Elements	90.9	84.7	81.9
Statutory rape: Mistake-of-fact defense	90.9	90.2	90.8
Sexual harassment	9.5	12.3	9.2
Failure to act	93.0	95.0	89.4
Gender: Sentencing standards	9.5	16.4	9.7
Gender: Capital punishment	18.6	17.2	15.9
Gender: Treatment of victims/witnesses	27.9	28.3	15.6
Gender: Culpability of accomplices	9.3	23.1	18.8
Prosecutorial discretion: "Turning"	13.6	16.8	16.9
Marital duress	27.9	35.8	36.5
Prostitution: Elements	25.0	23.6	27.7
Prostitution: Criminalization	52.2	43.4	47.0
Prostitution: Vagueness	40.9	29.3	37.9
Prostitution: Sanctions on "johns"	26.6	33.3	33.8
Pornography	27.3	21.5	18.2
PMS defense	27.3	30.1	33.3
Ways to correct sex discrimination in laws	22.7	23.5	19.0

<sup>a</sup>Not all respondents answered all questions. Ns ranged from 42-44 (for 20-34% female student body); 118-124 (35-44%); 62-66 (over 45%).

other differences in experience, certainly suggest that a mixed classroom would differ from a male-only or male-dominated class because men and women are likely to differ in consciousness of bias. See Goode, *Why Men Resist*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 131, 137 (B. Thorne & M. Yalom ed. 1982); cf. Brod, *Toward Men's Studies*, in *CHANGING MEN* 263, 272-75 (M. Kimmel ed. 1987).

There were some differences, but little overall tendency for coverage of gender-related topics to increase or decrease linearly with perceived percentage of women in the student body.

Several topics were less frequently covered where there were more women students: diminished-capacity defense to rape (64.3% of those teaching in law schools with a female enrollment of 20-34% compared to 51.6% in schools with an enrollment of over 45%); elements of the crime of statutory rape (90.9% compared to 81.9%); gender differences in treatment of victims and witnesses (27.9% compared to 15.6%); and pornography (27.3% compared to 18.2%). Gender differences in culpability (9.3% of responding professors teaching in law schools with a female enrollment of 20-34% compared to 18.8 % in schools with over 45% female enrollment) and wife's misconduct as provocation (51.1% compared to 83.9%) were covered more frequently with a stronger presence of women in the classroom. These differences are not easily explained; the particulars of coverage and perhaps the nature of the specific law school may account for the patterns. It is interesting that the perceived proportion of women in the student body makes virtually no difference in coverage of "ways to correct sex discrimination in laws."

Even harder to explain are several curvilinear relationships, where the middle category of 35-44% female enrollment is set off slightly from those with fewer or more women students. For example, almost three quarters of professors at schools that are 35-44% female cover "reasonableness and gender," while only around 60% of those at other schools do so. Middle-range schools are also slightly more likely to cover gender differences in sentencing and less likely to cover "vagueness" of the laws of prostitution.

Data not included here suggest that it is schools with fewer than 30% women that are distinctive. Thirty percent may be a critical mass of women that supports certain kinds of coverage of gender-related criminal law topics. Schools with fewer than 30% women are also least likely to have a sex-discrimination course. But only eleven schools had fewer than 30% women in 1985,<sup>104</sup> which is why the categories are collapsed in Table 7. It may be that the distinctive features of law schools with small female enrollments are due to idiosyn-

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104. See 1985 REVIEW OF LEGAL EDUCATION, *supra* note 22, at 4-62.

crasies of the individual schools that represent essentially random variation.

### C. Perceived Polarization of Male and Female Students

Theory and experience in other settings suggest that male and female students might polarize in response to presentation of gender-related topics.<sup>105</sup> Professors were not asked directly whether perceived class polarization would influence their coverage, but they were questioned as to what polarization they perceived in response to presentation of the various gender-related topics.

Table 8 orders topics by the degree to which the total sample perceives the topic to polarize male and female students. Table 9 explores sex differences in the relationship between perceived polarization and coverage. Unfortunately, not all responding professors answered all the items; some items received minimal response. Given the potential unrepresentativeness of those who did respond, few firm conclusions can be drawn. For example, although sexual harassment was perceived to be the most divisive topic (39.4%), only thirty-three responding professors answered this question.

The most general observation is that relatively little polarization is perceived. No topic is thought by a majority of professors to polarize male and female students, and only four topics are so perceived by more than 20% of respondents: and sexual harassment (39.4%); mistake-of-fact defense to rape (32.0%); ways that sex discrimination in law can be corrected (28.6%); and self-defense by battered women (23.4%).

Comparing the perceptions of men and women professors is actually the most interesting use of these data. We see immediately from Table 9 that women professors are more likely to report polarization—on twenty-two of the twenty-nine topics—than men. (If we eliminate from consideration those topics where fewer than ten women responded, the figure is thirteen out of fourteen).

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105. Goode, *supra* note 103, at 136-37 presents a sociology of subordinates to explain "why men resist" perceiving and acknowledging women's disadvantage in society. This theory suggests that men and women will have sharply divergent views on gender-related issues. See also Aiken, Anderson, Dinnerstein, Lesnick & MacCorquodale, *Tying Transformations: Curriculum Integration and the Problem of Resistance*, in RECONSTRUCTING THE ACADEMY 104, 115-21 (E. Minnich, J. O'Barr & R. Rosenfeld eds. 1988).

TABLE 8

RANK ORDER OF GENDER-RELATED CRIMINAL LAW TOPICS  
BY PERCEPTION OF POLARIZATION  
AMONG MALE AND FEMALE STUDENTS

Topic	Percentage Who Perceive Male/Female Students to be Polarized by Topic	
	%	N
Sexual harassment	39.4	(33)
Rape: Mistake-of-fact defense	32.0	(175)
Ways to correct sex discrimination in laws	28.6	(49)
Self-defense by battered women	23.4	(154)
Prostitution: Sanctions on "johns"	19.0	(63)
Reasonableness and gender	17.3	(127)
Battering by spouses	16.9	(142)
Rape: Elements	16.0	(156)
PMS defense	15.8	(57)
Rape: Potential victims	14.9	(121)
Abortion	13.4	(112)
Statutory rape: Mistake-of-fact defense	13.2	(152)
Wife's misconduct as provocation	13.1	(122)
Killing of fetus as homicide	12.6	(174)
Rape: Death penalty	11.6	(96)
Prostitution: Criminalization	11.5	(78)
Gender: Treatment of victims/witnesses	10.9	(55)
Rape: Diminished-capacity defense	10.8	(102)
Pornography	9.1	(44)
Statutory rape: Elements	8.8	(148)
Failure to act	8.2	(159)
Gender: Sentencing standards	7.1	(42)
Gender: Culpability of accomplices	7.0	(43)
Gender: Capital punishment	6.8	(44)
Marital duress	6.3	(63)
Prosecutorial discretion: "Turning"	5.1	(39)
Prostitution: Elements	4.3	(47)
Conspiracy between spouses	2.6	(78)
Prostitution: Vagueness	1.8	(57)

TABLE 9

PERCEIVED POLARIZATION  
OF M/F CRIMINAL LAW STUDENTS  
BY TOPIC AND SEX OF PROFESSOR

Topic	Perceived Polarization				
	Male		Female		Ratio F/M <sup>a</sup>
	%	N	%	N	
Killing of fetus as homicide	10.8	(148)	22.2	(27)	2.06
Abortion	12.2	(98)	20.0	(15)	1.64
Conspiracy between spouses	2.7	(74)	0.0	(6)	M
Battering by spouses	14.4	(118)	25.9	(27)	1.80
Self-defense by battered women	20.0	(130)	40.0	(25)	2.00
Reasonableness and gender	12.5	(104)	39.1	(23)	3.13
Wife's misconduct as provocation	14.2	(106)	6.3	(16)	0.44
Rape: Elements	14.7	(136)	22.7	(22)	1.54
Rape: Mistake-of-fact defense	29.0	(142)	43.3	(30)	1.49
Rape: Diminished-capacity defense	9.3	(97)	28.6	(7)	F
Rape: Death penalty	11.0	(82)	13.3	(15)	1.20
Rape: Potential victims	14.2	(106)	21.4	(14)	1.51
Statutory rape: Elements	7.7	(130)	15.8	(19)	2.05
Statutory rape: Mistake-of-fact defense	12.9	(124)	14.3	(28)	1.11
Sexual harassment	32.3	(31)	66.7	(3)	F
Failure to act	5.5	(127)	18.8	(32)	3.42
Gender: Sentencing standards	5.7	(35)	12.5	(8)	F
Gender: Capital punishment	7.7	(39)	0.0	(6)	M
Gender: Treatment of victims/witnesses	8.5	(47)	22.2	(9)	F
Gender: Culpability of accomplices	7.1	(42)	0.0	(2)	M
Prosecutorial discretion: "Turning"	5.4	(37)	0.0	(3)	M
Marital duress	6.9	(58)	8.5	(5)	F
Prostitution: Elements	4.3	(46)	33.3	(3)	F
Prostitution: Criminalization	10.6	(66)	21.4	(14)	2.02
Prostitution: Vagueness	0.0	(52)	16.7	(6)	F
Prostitution: Sanctions on "johns"	17.9	(56)	37.5	(8)	F
Pornography	9.3	(43)	0.0	(2)	M
PMS defense	18.4	(49)	0.0	(8)	M
Ways to correct sex discrimination in laws	27.9	(43)	28.6	(7)	-

<sup>a</sup>Where female respondents number less than 10, ratios were not calculated. "M" or "F" designates which is most likely to perceive polarization.

How can this difference be explained? It could be a consequence of women's societal training, which could make them more likely to register emotional tension in the classroom.<sup>106</sup> We suspect, however, that class polarization over gender-related issues is verbalized sufficiently so that it would be hard to overlook. It thus seems probable that women teachers report more polarization because in fact they are more likely to experience it. Male students may be alert to criticize female professors for what they view as antimale attitudes or an obsession with sex bias. Moreover, female professors are less protected by teaching authority. Social psychological research indicates that in similar circumstances male professionals are more likely than females to be favorably evaluated and perceived as competent and authoritative.<sup>107</sup> In the criminal law classroom, males' coverage of gender-related topics may be viewed as legitimate and professional, females' as political and inappropriate. Moreover, students perceive female professors to be less authoritarian than male professors.<sup>108</sup> They may be seen as more receptive to student opinion, thus offering a forum for male and female students to engage in conflict on gender-related as well as other topics. Finally, women students, perceiving support for feminist views from a woman professor, may more freely express these views, making manifest a conflict of opinions that might have remained latent in a male professor's classroom.<sup>109</sup>

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106. See A. SIMEONE, *ACADEMIC WOMEN* 54, 58-60, 73 (1987). Carol Gilligan remarks on women's perception of the social world in terms of the "web of interconnection" among people. C. GILLIGAN, *IN A DIFFERENT VOICE* 57 (1982).

107. See A. SIMEONE, *supra* note 106, at 62-66; J. GAPPA & B. UEHLING, *WOMEN IN ACADEME* 59 (1979); Goebel & Cashen, *Age, Sex, and Attractiveness as Factors in Student Ratings of Teachers: A Developmental Study*, 71 *J. EDUC. PSYCHOLOGY* 646, 646 (1979); Pheterson, Kiesler, & Goldberg, *Evaluation of the Performance of Women as a Function of Their Sex, Achievement, and Personal History*, 19 *J. PERSONALITY & SOC. PSYCHOLOGY* 114, 116 (1971); Sapiro, *If U.S. Senator Baker Were A Woman: An Experimental Study of Candidate Images*, 3 *POL. PSYCHOLOGY* 61, 64, 75 (1982). For a detailed report on difficulties faced by female professors in their interaction with male students and faculty, see B. SANDLER WITH R. HALL, *CAMPUS CLIMATE REVISITED* (1986) (a report of the Project on the Status and Education of Women, Association of American Colleges, Washington, D.C.).

108. S. Bennett, *Student Perceptions of and Expectations for Male and Female Instructors: Evidence Relating to Gender Bias in Teaching Evaluations*, 74 *J. EDUC. PSYCHOLOGY* 170, 178 (1982). But see R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 302 (1977) (finding that "[i]ndividual differences were more striking than sex differences" in determining leadership styles).

109. Karp & Yoels, *The College Classroom: Some Observations on the*

With regard to specific topics, criminalization of failure to act produces the greatest male-female difference in perceived polarization. Reasonableness and gender is also three times more likely to be perceived as divisive by women professors. Topics at least twice as likely to be perceived as polarizing by female compared to male faculty include: killing of fetus as homicide, self-defense by battered women, elements of statutory rape, and criminalization of prostitution. Others more likely to be perceived as polarizing by female than male professors are: abortion, battering by spouses, elements of rape, mistake-of-fact defense to rape, and who can be a victim of rape.

Male faculty are more likely to report as divisive the issue of wife's misconduct as provocation. Other issues on which men report more polarization are responded to by so few women that comparisons are suspect. Despite limited response, it is worth noting that men and women report similar high levels of polarization when covering ways that sex discrimination in law can be corrected (27.9% and 28.6%).

## VI. SUMMARY AND CONCLUSION: BRINGING THE CRIMINAL LAW CURRICULUM INTO THE NINETIES

This survey of 238 criminal law professors provides basic data on coverage of selected gender-related topics in the criminal law course and on some variations in coverage associated with professorial characteristics and teaching situation.

### A. Summary

A substantial majority of the responding professors agree that it is important to teach the relationship between criminal law and social and political concerns, although only one fifth

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*Meanings of Student Participation*, in SOCIAL INTERACTION 187, 190 (C. Clark & H. Robboy 3d ed. 1988) (finding that "[f]emale student participation is maximized under the influence of female professors").

take the opportunity to do so by including "ways that sex discrimination in law can be corrected."

Spouse abuse is typically included in a criminal law course (70%). The important related issues of self-defense pleas to spousal homicides committed in abusive situations (81%) and of the relationship between reasonableness and gender (67%) also are covered frequently.<sup>110</sup>

Doctrines of marital duress and conspiracy between spouses, connected to outmoded concepts of wives' dependency on husbands, have been dropped from the curriculum by a large majority of professors. Crimes regulating sexual morality and representing the social control of women's sexuality and reproductive capacity remain, although only abortion is covered by more than 50% of respondents. Pornography and topics related to prostitution are covered by substantial minorities. Of course, we do not know how these topics are presented when they are included. For that reason, the significance of statistics on coverage of these and many other topics is difficult to interpret. Topics can simply be presented in traditional ways or they can be used to raise sex bias issues.

Topics relating to gender differentials in the operation of the criminal justice system are seldom covered by criminal law professors. The vast majority of respondents believe that these topics properly belong in a criminal procedure or sentencing course.

### *B. Limitations of the Study*

This report of data on coverage of gender-related topics in the criminal law course needs to be qualified by noting some limitations of the study:

1) The sample of 238 criminal law professors is substantial, but represents only 31% of those to whom the questionnaire was sent. Although the range of social charac-

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110. The topics of spouse abuse and self-defense by battered women were covered by only one casebook apiece out of the seven casebooks surveyed in Erickson, *Final Report*, *supra* note †. For comparisons between casebook reviews and questionnaire results, see *Final Report*, *supra* note †, at 492-99.



teristics of responding professors was broad and the proportion of female responding professors approximated that of the total population of criminal law teachers, we have no sure way of knowing whether our respondents are representative. It may be that those more sympathetic to the research purpose responded. Response rates may have varied by type of law school, length of career, or in some other way.

2) Respondents did not answer all of the questions, particularly those toward the end of the questionnaire and those involving perceived polarization. We have endeavored to carefully call this limitation to the reader's attention where response was particularly low.

3) Several questions, notably "wife's misconduct as provocation" and "sexual harassment," were misunderstood by some respondents. An intended question on marital rape was inadvertently not included on the questionnaire.

4) With the exception of Table 5, which looks at sex and length of teaching career simultaneously, we have examined only first-order relationships among the variables, that is, considered the effects of only one characteristic at a time on the coverage of gender-related issues.

5) Because we did not develop a variable to indicate global differences among law schools (in prestige, region, sponsorship, age, legal philosophy, LSAT scores of students, etc.), a variable that would be difficult to construct, we did not consider the ethos of the law school as a possible influence on topical coverage. It may be that apparent associations between coverage of gender-related topics and sex of professor, length of professor's criminal law teaching career, sex composition of the student body, existence of a sex-discrimination course, and classroom polarization over gender-related topics simply reflect the general tendency of a law school toward innovation or conservatism.

6) The fact of coverage does not reveal enough about the content of coverage. We can read coverage of a traditional topic like marital duress to represent a legal perspective that reflects traditional views on gender roles, but this topic could also be taught so as to challenge bias and raise consciousness. It is easy enough to ascribe a progressive point of view to the teaching of new topics like spouse abuse, but difficult to infer the perspective from which more traditional topics are taught.

### C. Conclusion

Although the survey did not address specifically the question of *how* gender-related topics are taught, we hope that this systematic review of gender-related topics will stimulate discussion and reflection leading to curricular modification. It should increase awareness of how many criminal law topics, as they are traditionally taught, imply social roles for women that no longer are accepted widely.<sup>111</sup>

Law is shaped by its practice, and practice by the education of the practitioner. As part of the general evolution of rights in recent decades, we have become aware of the way in which sex bias in the criminal law has disadvantaged women (and sometimes men). The legal theories and practical applications to which our law faculty and graduates are committed will ordain, to a great extent, the future course the law will take in determining which behaviors are criminalized, how the criminal justice system treats men and women, and whether judgments of guilt or innocence take account of the sometimes different circumstances of men's and women's lives.

Analyzing the relationship of gender and law may be of interest to the criminal law professor for several reasons. Exploring the relationship between law and society is a significant intellectual concern. Feminist legal theory, which is receiving considerable attention as it is incorporated into the law school curriculum, is one manifestation of this interest.<sup>112</sup> Moreover, teaching will be more effective where student interest and understanding are increased by taking into account the social experience of all students, women and men. Finally, legal doctrines or case examples that raise issues of gender can illuminate the basic concepts of the criminal law in useful ways.<sup>113</sup> In a teaching context in

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111. Numerous sources describe changing roles for women. See, e.g., S. McLAUGHLIN, B. MELBER, J. BILLY, D. ZIMMERLE, L. WINGES & T. JOHNSON, *THE CHANGING LIVES OF AMERICAN WOMEN* (1988); *WOMEN: A FEMINIST PERSPECTIVE* (J. Freeman 4th ed. 1989).

112. "I think it's the most interesting intellectual movement in law in quite some time," said Geoffrey Stone, dean of the University of Chicago law school, *quoted in* Lewin, *For Feminist Scholars, Second Thoughts on Law and Order*, N.Y. Times, Sept. 30, 1988, at B9, col. 3.

113. A major thrust of a previous work is to demonstrate to professors and authors of casebooks how gender-related topics may be excellent vehicles for teaching central issues of criminal law in challenging, innovative ways. See Erickson, *Final*

which female (and male) students are keenly aware of bias in law and in presentation of the law, educational interests are often best served by directly addressing issues of sex bias.

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*Report, supra* note †. It makes concrete suggestions, using both traditional cases and newer cases and materials.

## APPENDIX A

TABLE 10  
REASONS FOR NOT COVERING  
A GENDER-RELATED TOPIC

Legend: A - Not covered or poorly covered in textbook  
B - Professor uncomfortable with topic  
C - Adverse student reaction  
D - Not as important as other topics  
E - Belongs in another course

Topic	Responses	% A B C D E				
		A	B	C	D	E
Killing of fetus as homicide	(38)	29.0	2.6	-	55.3	13.2
Abortion	(103)	17.3	0.9	-	24.3	58.3
Conspiracy between spouses	(134)	23.1	0.7	0.7	72.7	2.8
Battering by spouses	(63)	39.7	-	-	46.0	14.3
Self-defense by battered women	(41)	58.4	-	-	34.1	7.3
Reasonableness and gender	(59)	27.1	1.7	1.7	52.5	16.9
Wife's misconduct as provocation	(61)	27.9	-	1.6	65.6	4.9
Rape: Elements	(24)	20.8	8.3	-	70.1	-
Rape: Mistake-of-fact defense	(7)	*	*	*	*	*
Rape: Diminished-capacity defense	(79)	29.7	-	1.3	58.2	11.4
Rape: Death penalty	(93)	19.3	-	-	57.0	23.7
Rape: Potential victims	(57)	38.1	1.8	1.8	56.3	1.8
Statutory rape: Elements	(29)	13.8	-	-	82.8	3.4
Statutory rape: Mistake-of-fact defense	(16)	31.2	-	-	62.5	6.3
Sexual harassment	(168)	23.2	-	-	32.1	44.6
Failure to act	(13)	30.8	-	-	38.5	30.8
Gender: Sentencing standards	(165)	26.0	-	-	39.3	34.5
Gender: Capital punishment	(159)	23.2	-	-	45.3	31.4
Gender: Treatment of victims/witnesses	(142)	21.0	-	-	42.8	36.2
Gender: Culpability of accomplices	(151)	24.7	-	-	60.3	16.0
Prosecutor discretion: "Turning"	(153)	19.6	-	-	38.7	41.9
Marital duress	(119)	26.9	-	0.8	65.5	6.7
Prostitution: Elements	(140)	19.2	-	0.7	72.9	7.1
Prostitution: Criminalization	(103)	11.8	1.0	-	74.8	12.6
Prostitution: Vagueness	(121)	16.5	-	-	71.9	11.6
Prostitution: Sanctions on "johns"	(125)	22.4	-	-	66.4	11.2
Pornography	(150)	14.0	0.7	-	43.2	42.4
PMS defense	(135)	34.1	1.5	-	57.0	7.4
Ways to correct sex discrimination in laws	(148)	16.2	0.7	-	30.4	52.7

TABLE 11

COVERAGE OF GENDER-RELATED CRIMINAL LAW TOPICS  
BY SEX OF PROFESSOR

Topic	Coverage (in %)		M/F Ratio
	Males <sup>a</sup>	Females <sup>b</sup>	
Killing of fetus as homicide	84.5	80.6	1.05
Abortion	54.1	41.7	1.30
Conspiracy between spouses	41.2	19.4	2.12
Battering by spouses	67.3	80.6	.84
Self-defense by battered women	79.5	88.9	.89
Reasonableness and gender	64.4	80.0	.81
Wife's misconduct as provocation	66.8	64.7	1.03
Rape: Elements	87.2	80.6	1.08
Rape: Mistake-of-fact defense	94.4	97.1	.97
Rape: Diminished-capacity defense	57.1	30.6	1.87
Rape: Death penalty	48.7	44.4	1.10
Rape: Potential victims	72.0	45.7	1.58
Statutory rape: Elements	86.4	72.2	1.20
Statutory rape: Mistake-of-fact defense	89.9	91.7	.98
Sexual harassment	11.8	5.6	2.11
Failure to act	91.3	100.0	.91
Gender: Sentencing standards	12.9	17.1	.75
Gender: Capital punishment	17.3	14.3	1.21
Gender: Treatment of victims/witnesses	24.4	24.2	1.01
Gender: Culpability of accomplices	21.8	5.9	3.70
Prosecutorial discretion: "Turning"	17.9	5.7	3.14
Marital duress	36.7	22.2	1.65
Prostitution: Elements	27.9	5.6	4.98
Prostitution: Criminalization	47.5	38.9	1.22
Prostitution: Vagueness	35.2	22.2	1.59
Prostitution: Sanctions on "johns"	34.3	22.2	1.55
Pornography	23.4	8.3	1.21
PMS defense	29.6	30.6	.97
Ways to correct sex discrimination in laws	20.6	28.6	.72

<sup>a</sup>Ns range from 194-200.

<sup>b</sup>Ns range from 33-36.

## APPENDIX B

## QUESTIONNAIRE

Course and Course Materials:

1. Is the basic criminal law course a required course at your school?

1. Yes (ANSWER QUESTION 2a)
2. No (ANSWER QUESTION 2b)

2a. If yes, in what year? \_\_\_\_\_

2b. If no, do most students take it anyway?

1. Yes
2. No
3. Don't know

3. How many credits is the basic criminal law course at your school?

\_\_\_\_ credits                      How many semesters?      \_\_\_\_ semesters

4. What other criminal law courses are offered at your school?

\_\_\_\_\_  
\_\_\_\_\_

5. Does your school offer a course in sex-based discrimination?

1. Yes
2. No
3. Don't know

6. What casebook do you use to teach the basic criminal law course?

a. Author(s): \_\_\_\_\_ Edition: \_\_\_\_\_

b. Why did you select this particular casebook?

\_\_\_\_\_  
\_\_\_\_\_

c. How long have you used this casebook, including previous editions? \_\_\_\_ years

d. Which parts of the casebook are assigned? (You may attach syllabus)

\_\_\_\_\_  
\_\_\_\_\_

7. Please name any other hornbook, treatise, or book used:

\_\_\_\_\_

8. Other materials assigned:

\_\_\_\_\_

(If these are mimeo materials, compiled by you, we would appreciate your sending a set)

9. What substantive crimes does the course cover?

\_\_\_\_\_

10. What are the three most important things you want to cover in your criminal law course?

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

### Topic Coverage:

The following is a list of some topics affecting women or that might be of particular concern to one sex. Please indicate whether you cover the topic in your course and, if so, approximately how many class hours you spend on it. Some of these topics may not be "covered" per se but may arise in the context of a case used to "cover" another topic. If so, and if you then highlight or discuss the topic, indicate that you "cover" it. If you do not cover the topic in your course, please indicate why not by circling the appropriate number, 1-6, as follows:

1. Not covered in the book (would cover it if it were in the book).
2. Covered too poorly in the book.
3. Professor feels uncomfortable with the topic.
4. Adverse student reaction to the topic.
5. Not as important as other topics.
6. Belongs in another course (specify which course on line below) or other (Please explain on line below).

You may circle more than one number if appropriate. Finally, indicate whether the topic tends to polarize male and female students.

### [CATEGORIES PROVIDED FOR EACH TOPIC]

Do you cover in course?	Time spent on topic (in hours)	If not covered, why not?	Does topic polarize M/F students
Yes No	_____	1 2 3 4 5 6	Yes No

11. Killing of fetus as homicide.

12. Abortion.

13. Conspiracy between spouses.
14. Battering by spouses.
15. Self-defense by battered women.
16. Relationship between reasonableness and gender ("reasonable man").
17. Wife's misconduct as provocation.
18. Rape:
  - a. Elements of the crime.  
[no b]
  - c. Mistake of fact defense.
  - d. Diminished capacity defense.
  - e. Death penalty for.
  - f. Who can be a victim.
19. Statutory rape:
  - a. Elements of the crime.
  - b. Mistake of fact defense.
20. Sexual harassment.
21. Criminalization of failure to act, e.g., child neglect.
22. Gender differentials:
  - a. In sentencing standards.
  - b. In capital punishment.
  - c. In treatment of victim and witnesses in the criminal justice system.
  - d. In degrees of culpability of accomplices.
23. Prosecutorial discretion regarding who to "turn" against whom.
24. Doctrine of marital duress.
25. Prostitution:
  - a. Elements of the crime
  - b. Criminalization.
  - c. Vagueness.
  - d. Criminal sanctions on "Johns".
26. Pornography.
27. Premenstrual syndrome (PMS) defense.



28. Ways that sex discrimination in laws can be corrected.

Background Information

29. How many years have you taught in law school? \_\_\_\_ years

30. How long have you taught criminal law? \_\_\_\_ years

31. How long did you practice criminal law?  
\_\_\_\_ years      99. Have not practiced criminal law.

32. What law school(s) did you attend?

\_\_\_\_ Graduated 19\_\_\_\_  
\_\_\_\_ Graduated 19\_\_\_\_

33. Roughly, what is the percentage of women students at your law school? \_\_\_\_%

34. What is your sex?

1. Male      2. Female

35. On a scale of 1 to 7, how important do you believe it is to teach in the criminal law course the relationship between criminal law and social and political concerns?

Not				Very		
Important				Important		
1	2	3	4	5	6	7

Thank you for participating in this study. We would appreciate any additional comments you might have: